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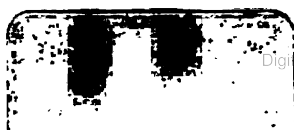
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2015-11-14



# BAR ASSOCIATION

OF THE

STATE OF KANSAS

Held in the City of Topeka

January 27 & 28, 1898



FIFTEENTH ANNUAL MEETING  
OF THE  
BAR ASSOCIATION

OF THE  
STATE OF KANSAS.

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HELD IN THE CITY OF TOPEKA, JANUARY 27, AND 28, 1898.

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THE TIMES.  
CLAY CENTER, KANSAS.  
1898.

**LIBRARY OF THE  
LELAND STANFORD, JR., UNIVERSITY  
LAW DEPARTMENT.**



## OFFICERS FOR THE YEAR 1898.

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PRESIDENT.....S. H. ALLEN.  
VICE-PRESIDENT.....C. C. COLEMAN.  
SECRETARY.....C. J. BROWN.  
TREASURER.....A. A. GODARD.

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### Executive Council.

C. B. GRAVES, CHAIRMAN.

J. D. McFARLAND,  
L. C. BOYLE,

LEE MONROE,  
McCABE MOORE.

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### Delegates to American Bar Association.

WILLIAM THOMSON,

C. S. GLEED,

E. C. LITTLE.

### Alternates.

W. C. PERRY,

E. W. CUNNINGHAM,

J. W. PARKER.

### Committee on Amendments to Laws.

J. D. McCLEVERTY,

SILAS W. PORTER,

FRANK WELLS,

MORRIS OLIGGETT,

N. H. LOOMIS.

### Judiciary Committee.

L. STILLWELL,

DAVID OVERMEYER,

C. H. KIMBALL,

JAMES FALLOON,

B. F. MILTON.

### Memorial Committee.

J. W. GREEN,

E. F. WARR,

GEO. W. CLARK.

### Committee on Legal Education and State University Law School.

DAVID MARTIN,

A. W. BENSON,

SAM KIMBALL,

H. E. VALENTINE,

SIDNEY HAYDEN.

26720

## OFFICERS OF PREVIOUS YEARS.

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### OFFICERS FOR THE YEARS 1883-4.

<i>President</i> .....ALBERT H. HORTON.	<i>Secretary</i> .....W. H. ROSSINGTON.
<i>Vice-President</i> .....N. T. STEPHENS.	<i>Treasurer</i> .....D. M. VALENTINE.

#### Executive Council.

D. M. VALENTINE, <i>Chairman</i> ,	JAMES HUMPHREY,	DAVID MARTIN,
J. H. GILLPATRICK,	FRANK DOSTER.	

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### OFFICERS FOR THE YEAR 1885.

<i>President</i> .....ALBERT H. HORTON.	<i>Secretary</i> .....W. H. ROSSINGTON.
<i>Vice-President</i> .....W. A. JOHNSTON.	<i>Treasurer</i> .....D. M. VALENTINE.

#### Executive Council.

D. M. VALENTINE, <i>Chairman</i> ,	JAMES HUMPHREY,	DAVID MARTIN,
E. S. TORRANCE,	L. HOUK.	

#### Delegates to American Bar Association.

A. S. EVEREST,	A. L. REDDEN,	JAMES HUMPHREY.
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### OFFICERS FOR THE YEAR 1886.

<i>President</i> .....ALBERT H. HORTON.	<i>Secretary</i> .....JOHN W. DAY.
<i>Vice-President</i> .....E. S. TORRANCE.	<i>Treasurer</i> .....D. M. VALENTINE.

#### Executive Council.

W. A. JOHNSTON, <i>Chairman</i> ,	JOHN GUTHRIE,	A. W. BENSON,
M. B. NICHOLSON,	JOHN H. MAHAN.	

#### Delegates to American Bar Association.

DAVID J. BREWER,	W. H. ROSSINGTON,	FRED D. MILLS.
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**OFFICERS FOR THE YEAR 1887.**

<i>President</i> .....	SOLON O. THACHER.	<i>Secretary</i> .....	JOHN W. DAY.
<i>Vice-President</i> ...	HENRY C. SLUSS.	<i>Treasurer</i> .....	D. M. VALENTINE.

**Executive Council.**

W. A. JOHNSTON, <i>Chairman</i> .	C. B. GRAVES,	ROBERT CROZIER,
GEORGE S. GREEN,	T. F. GARVER.	

**Delegates to American Bar Association.**

W. W. GUTHRIE,	A. L. REDDEN,	T. A. HURD.
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**OFFICERS FOR THE YEAR 1888.**

<i>President</i> .....	W. A. JOHNSTON.	<i>Secretary</i> .....	JOHN W. DAY.
<i>Vice-President</i> ....	EUGENE F. WARE.	<i>Treasurer</i> .....	D. M. VALENTINE.

**Executive Council.**

JOHN GUTHRIE, <i>Chairman</i> ,	S. B. BRADFORD,	GEORGE J. BARKER,
J. W. ADY,	J. H. MAHAN.	

**Delegates to American Bar Association.**

SOLON O. THACHER,	ALBERT H. HORTON,	HENRY C. SLUSS.
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**OFFICERS FOR THE YEAR 1889.**

<i>President</i> .....	JOHN GUTHRIE.	<i>Secretary</i> .....	CHAS. S. GLEED.
<i>Vice-President</i> .....	T. F. GARVER.	<i>Treasurer</i> .....	D. M. VALENTINE.

**Executive Council.**

B. F. SIMPSON, <i>Chairman</i> ,	W. W. SCOTT,	L. B. KELLOGG,
A. W. BENSON,	CHAS. S. HAYDEN.	

**Delegates to American Bar Association.**

J. W. GREEN,	J. H. GILLPATRICK,	CHARLES MONROE.
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**Delegates to National Bar Association.**

ROBERT CROZIER,	M. B. NICHOLSON,	ROBERT M. EATON,
GEO. S. GREEN,	H. L. ALDEN,	J. W. ADY,

**OFFICERS FOR THE YEAR 1890.**

<i>President</i> .....ROBERT CROZIER.	<i>Secretary</i> .....C. J. BROWN.
<i>Vice-President</i> .....CHAS. B. GRAVES.	<i>Treasurer</i> .....HOWEL JONES.

**Executive Council.**

B. F. SIMPSON, <i>Chairman</i> ,	JOHN GUTHRIE,	CASE BRODERICK,
W. W. SCOTT,	R. M. EATON.	

**Delegates to American Bar Association.**

GEORGE S. GREEN,	L. B. KELLOGG,	W. C. PERRY.
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**Delegates to National Bar Association.**

W. A. JOHNSTON,	B. P. WAGGENER,	A. H. ELLIS,
J. W. GLEED,	G. F. LITTLE,	J. F. McMULLEN.

**OFFICERS FOR THE YEAR 1891.**

<i>President</i> .....D. M. VALENTINE.	<i>Secretary</i> .....C. J. BROWN.
<i>Vice-President</i> ....L. HOUK.	<i>Treasurer</i> .....HOWEL JONES.

**Executive Council.**

T. F. GARVER, <i>Chairman</i> ,	E. W. CUNNINGHAM,	M. B. NICHOLSON,
J. R. McCLURE,	W. P. DOUTHITT.	

**Delegates to American Bar Association.**

T. F. GARVER,	B. P. WAGGENER,	J. H. GILLPATRICK.
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**Delegates to National Bar Association.**

W. A. JOHNSTON,	A. H. ELLIS,	G. F. LITTLE,
ROBERT CROZIER,	J. W. GLEED,	J. F. McMULLEN.

**OFFICERS FOR THE YEAR 1892.**

<i>President</i> .....T. F. GARVER.	<i>Secretary</i> .....C. J. BROWN.
<i>Vice-President</i> .....J. W. GREEN.	<i>Treasurer</i> .....HOWEL JONES.

**Executive Council.**

W. C. WEBB, <i>Chairman</i> ,	C. ANGEVINE,	E. W. MOORE,
WINFIELD FREEMAN,	A. A. HARRIS.	

**Delegates to American Bar Association.**

JAMES HUMPHREY,	F. P. HARKNESS,	J. D. MILLIKEN.
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**Delegates to National Bar Association.**

T. N. SEDGWICK,	DAVID OVERMYER,	S. W. VANDIVERT.
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**OFFICERS FOR THE YEAR 1893.**

<i>President</i> .....JAMES HUMPHREY.	<i>Secretary</i> .....C. J. BROWN.
<i>Vice-President</i> ....H. L. ALDEN.	<i>Treasurer</i> .....HOWEL JONES.

**Executive Council.**

J. D. MILLIKEN, <i>Chairman</i> ,	N. H. LOOMIS,	A. H. ELLIS,
SAM KIMBLE,	H. W. GLVASON.	

**Delegates to American Bar Association.**

A. L. WILLIAMS,	M. B. NICHOLSON,	A. J. ABBOTT.
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**Alternates.**

F. L. WILLIAMS,	T. A. HURD,	C. B. GRAVES.
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**Delegates to National Bar Association**

R. M. EATON,	W. A. S. BIRD,	C. W. SMITH.
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**OFFICERS FOR THE YEAR 1894.**

<i>President</i> .....J. D. MILLIKEN.	<i>Secretary</i> .....C. J. BROWN
<i>Vice-President</i> .....F. L. MARTIN.	<i>Treasurer</i> .....HOWEL JONES.

**Executive Council.**

H. L. ALDEN, <i>Chairman</i> ,	SAM KIMBLE,	J. W. GREEN,
T. L. BOND,	E. W. MOORE.	

**Delegates to American Bar Association.**

T. J. WHITE,	R. B. WELCH,	H. WHITESIDE.
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**Delegates to National Bar Association.**

F. P. HARKNESS,	W. C. PERRY,	W. H. ROSSINGTON.
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**Officers for the Year 1895.**

<i>President</i> .....H. L. ALDEN.	<i>Secretary</i> .....C. J. BROWN.
<i>Vice-President</i> .....J. B. LARIMER.	<i>Treasurer</i> .....HOWEL JONES.

**Executive Council.**

SAM KIMBLE, <i>Chairman</i> ,	T. B. WALL,	A. A. GODARD,
E. A. MCFARLAND,	J. D. MCCLEVERTY.	

**Delegates to American Bar Association.**

JOHN E. HESSIN,	R. F. THOMPSON,	JOHN W. ROBERTS.
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**Delegates to National Bar Association**

A. L. L. HAMILTON,	F. D. MILLS,	W. J. PATTEBSON.
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**Officers for the Year 1896.**

<i>President</i> .....DAVID MARTIN.	<i>Secretary</i> .....C. J. BROWN.
<i>Vice-President</i> .....WM. THOMSON.	<i>Treasurer</i> .....HOWEL JONES.

**Executive Council.**

A. A. GODARD, <i>Chairman</i> ,	T. B. WALL,	W. R. SMITH,
M. B. NICHOLSON,	JOHN W. DAY.	

**Delegates to American Bar Association .**

J. H. GILLPATRICK,	T. F. GARVER,	J. D. MILLIKEN.
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**Officers for the Year 1897.**

<i>President</i> ..... WM. THOMSON.	<i>Secretary</i> .....C. J. BROWN.
<i>Vice President</i> .....S. H. ALLEN	<i>Treasurer</i> .....A. A. GODARD.

**Executive Council.**

C. C. COLEMAN, <i>Chairman</i> ,	JOHN W. ROBERTS,	LEE MONROE,
MCCABE MOORE,	C. B. GRAVES,	

**Delegates to American Bar Association.**

SILAS PORTER,	T. B. WALL,	DAVID MARTIN.
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## Minutes of the Fifteenth Annual Meeting.

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TOPEKA, KANSAS, January 27, 1898.

The fifteenth annual meeting of the Bar Association of the State of Kansas was called to order at 2 o'clock p. m. in the Supreme Court Room, with the president, William Thomson, in the chair.

The reading of the minutes of the last meeting was dispensed with.

The committee on Legal Education and State University Law School made a verbal report of its visits to the school, and of its observations and examination of the work being done there, through W. A. Johnston chairman, and Henry McLean. Some consideration was given to the proposition to extend to three years the course of study required in the Law School, but no definite action was taken by the association.

Lee Monroe was appointed member of the Memorial Committee in place of F. Dumont Smith, who cannot be present at this meeting.

On motion of Howel Jones the following committee was appointed to nominate to the Association officers for the ensuing year: Howel Jones, C. B. Graves, W. A. Johnston, Henry Alden and Abijah Wells.

A. A. Godard, the treasurer of the Association, presented the following report, which, having been found correct by the Executive Council, was accepted and adopted:

### REPORT OF TREASURER.

Balance on hand at last report.....	\$185 16
Admission fees.....	85 00
Dues of 1895.....	12 00
Dues of 1896.....	81 00
Dues of 1897.....	252 00
Total receipts.....	\$565 16



## Expenditures, vouchers attached:

Expenses of banquet of 1897 .....	\$152 25	
Rental of chairs for meeting, 1897 .....	5 00	
Printing envelopes, cards, etc. ....	8 00	
C. J. Brown, Secretary, postage .....	10 00	
A. A. Godard, Treasurer, postage .....	11 00	
Printing circulars etc. ....	6 00	
D. A. Valentine, printing 750 copies of proceedings.....	180 00	
A. A. Godard, receipt book .....	25	
Total expenditures.....	\$372 50	\$372 50
Balance on hand .....		\$192 66

The annual address of the President was delivered by William Thomson on "Not to the Victors."

S. H. Allen, the vice-president, before yielding the chair, called special attention to the address just delivered as a timely and able presentation of the general subject of Civil Service Reform, and suggested the propriety and desirableness of its early publication and distribution as an important item in the discussion of this question now going on in Congress and among the people generally. And thereupon, after some discussion of the address by John Martin, David Overmyer and Sam Kimble, it was ordered that printed copies of it be sent to members of Congress at as early a date as possible.

The association adjourned till 8 o'clock p. m.

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JANUARY 27—EVENING SESSION.

Hon. P. S. Grosscup, of Chicago, delivered the Annual Address on "Popular Self Mastery The Duty of Lawyers Toward Its Promotion."

The address of Cassius G. Foster on "The Pardoning Power, Its Use and Abuse" was read to the Association by L. C. Boyle, Judge Foster being absent.

By an unanimous vote P. S. Grosscup, of Chicago, was elected an honorary member of the Association.

The Association adjourned till tomorrow at 9:30 o'clock.

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JANUARY 28—MORNING SESSION.

W. G. Holt delivered an address on "The Jury System."

F. L. Williams delivered an address on "The Law of Impeachment."

John I. Games, a student in the State University Law School, delivered an address on "A Discussion of the Eleventh Amendment."

The balance of the morning session was occupied by a discussion of the address of W. G. Holt on "The Jury System," participated in by T. F. Garver, C. B. Graves, John Martin, J. G. Slonecker, John D. Milliken, Sam Kimble, John E. Hessin, T. L. Bond and W. S. Roark. This discussion resulted in the adoption of the following resolution:

Resolved—That a committee of seven be appointed from the members of the Association whose duty it shall be to consider existing defects and weaknesses in the laws concerning the jury system of this State, and to prepare a bill to be submitted to the next Legislature of the State providing for any needed reforms or changes in such laws in order to secure a more efficient jury system, and the better administration of the law through jury trials in the courts.

Under this resolution the following committee was appointed by the President: T. F. Garver, C. B. Graves, Sam Kimble, W. G. Holt, Geo. W. Clark, J. D. Milliken and Henry McLean.

The Association adjourned till 2 o'clock p. m.

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JANUARY 28 -AFTERNOON SESSION.

Henry McLean delivered an address on "A People-Made Constitution."

L. H. Perkins delivered an address on "A Study in the English Constitution."

Chas. F. Spencer delivered an address on "The Law and the Agitator."

The Executive Council, through its chairman, C. C. Coleman, reported to the Association the names of the following applicants for membership, and recommended their election: A. M. Harvey, Topeka; B. H. Tracy, Wamego; John O. Wilson, Salina; Z. T. Hazen, Topeka; E. D. Kenna, Chicago; Francis E. Downey, Topeka; C. H. Curtis, Marion; Bennett R. Wheeler, Topeka; John S. Simmons, Dighton; A. A. Hurd, Topeka; O. L. Moore, Abilene; Frank Wells, Seneca; F. H. Foster, Parsons; R. W. Turner, Mankato; B. F. Milton, Dodge City.

This report of the Executive Council was adopted, and the lawyers named were duly elected members of the Association.

The Executive Council, through its chairman, called the attention of the Association to the fact that the present published roll of members included quite a number who are not interested in its affairs and who do not contribute to its support, and advocated the policy of so regulating the publication of the roll of members and the payment of dues, as to make the published roll show each year by whom the Association is being supported and by whom its work is being done.

The special points recommended by the Executive Council to be established are the following:

All dues which have accumulated against members prior to the last preceding year, 1897, to be canceled and stricken from the treasurer's books.

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No member can hereafter become indebted to the Association for more than one year's dues; his failure to pay such dues for one year will be construed by the Association to be his request to be omitted from the published roll of active members and from the active privileges of the Association.

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Each Association year ends with the annual meeting and banquet.

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The annual dues of the Association are \$3, and are due and payable to the Treasurer on or before May 1st of each year.

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All members whose dues for the *current year* are not paid by May 1st, will be notified by the Treasurer within thirty days thereafter and requested to make such payment, that no member may become in default for such dues through misunderstanding or oversight.

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On the *first day of March* the Secretary will make up the "Roll of *Active Members*" of the Association for the ensuing year, to be composed of those members who are not in arrears for the dues of the last preceding year.

Only this roll of *active members* will hereafter be published in the regular printed report of the "Proceedings of the Annual Meeting."

Only these *active members* of the Association will hereafter be entitled to participate in its proceedings or to a seat at its annual banquet.

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Twenty days before the 1st day of March, the date when the roll of active members for the year is made up, the Treasurer will notify all members in default for the dues of the *last preceding year* of such fact, and that their names will be omitted from the published roll of active members unless such dues are paid by that date.

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Any member whose name has been omitted from the published roll of *active members* for non-payment of dues may restore his name to such published roll, and himself to all the privileges of the Association, by the payment of the one year's dues for which he stands in default.

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A new member is not chargeable with dues for the year following his admission.

For the purpose of bringing about the reforms in the business conduct of the Association recommended by the Executive Council, the following resolutions were adopted:

Resolved—That the Treasurer be, and is hereby, instructed to strike from his books all unpaid dues for years prior to 1897.

Resolved—That Section 7, of the By-Laws be so amended as to read as follows:

Section 7. The Executive Council shall cause to be printed such a number of copies of the proceedings of its annual meeting as it shall deem best, not exceeding one thousand copies, and shall distribute the same to members of the Association, and to such other persons or associations, or societies, as they may deem prudent, and shall with the proceedings of each annual meeting print the roll of active and honorary members of the Association, and its Constitution and By-Laws.

Resolved—That the following new By-Laws be adopted and be numbered Sections 8, 9, 10, 11, 12 and 13.

Section 8. Every member of the Association shall pay to the Treasurer on or before the 1st day of May, of each year (after the year of his admission), annual dues of three dollars. All members who have not paid their annual dues on or before May 1st shall, within thirty days thereafter, be notified of this fact by the Treasurer and requested to forthwith comply with the requirements of this by-law.

Section 9. The Secretary shall keep a "general membership roll" on which shall appear in alphabetical order the name of every member of the Association from its organization, with the date of his admission.

The Secretary shall also keep an "honorary membership roll" to be composed of those members who shall be specially designated for this honor, by resolution of the Association on the formal written recommendation of the Executive Council.

The Secretary shall also prepare on the first day of March in each year, the "roll of active members" of the Association for that year, which shall include only those who have paid to the Treasurer their Association dues for the preceding year, and the new members by whom no dues are payable for that year.

Section 10. The Treasurer shall, twenty days before the 1st day of March in each year notify all active members in arrears for the dues of the preceding year, that the roll of active members for the year, to be printed in the Annual Report of the proceedings, will be made up on that date, and that their names must be omitted from that published roll of active members, unless their delinquent dues have been paid.

Section 11. Only the active and honorary members of the Association shall be entitled to participate in the proceedings of the Association, or to a seat at its annual banquet.

Section 12. On the general membership roll opposite each name omitted from the active membership roll, shall be noted the reason for such omission—whether death, non-payment of dues, or personal request.

Section 13. Any member whose name has been omitted from the active membership roll for non-payment of dues, may have his name restored to such roll by the payment of the year's dues for which he is in arrears.

Resolved—That Section 8 of the present By-Laws be numbered Section 14.

The Memorial Committee called the attention of the Association to the death of three of its honored members, during the past year, by the following report, which was duly adopted and ordered spread upon the record:

**MR. PRESIDENT AND MEMBERS OF THE BAR ASSOCIATION OF KANSAS:**

It would indeed be a pleasant duty for your Memorial Committee to perform could it submit as its report that each and every one of those whom we have heretofore been accustomed to meet on occasions like the present, and whose names but one short year ago appeared upon our roll of active members, were still alive, in vigorous health, and laboring in the line of their profession. On the contrary it is with sorrow that we chronicle the death of three of our distinguished brothers since the last meeting of this Association.

Wm. P. Douthitt died at his home in this city on Sunday evening, November 28, 1897; Ellis Lewis at Topeka, on August 12, 1897, and A. B. Campbell at the city of Chicago on December 20, 1897. As an expression of our sincere sorrow and regret as an Association at the loss we have sustained, your committee suggests that the following be adopted and caused to be entered on our records:

Wm. P. Douthitt, one of the pioneer lawyers of Kansas, was born in Indiana on December 18, 1827, graduated with honor and distinction from the law department of the University of that State in 1852, practiced law at Franklin, Ind., until 1857, when he removed to Kansas and settled on a tract of land adjoining this city, which remained his home until the date of his death. He served the people of Topeka faithfully and honorably in the State Legislature and, for forty years was known and respected by the bar of this State as one of its most learned, conscientious and honorable practitioners. By his death we lose a member whose devotion to his profession and fidelity to duty we may all emulate, his family and friends a companion whose private character was above reproach, and the community in which he lived an honored and useful citizen.

Ellis Lewis, another of the pioneer lawyers of Kansas, was born and educated in Indiana, where he practiced his profession for a number of years with distinction. At an early age he came West and for a time was located in Topeka. He shortly afterwards moved to Osage County where, for more than a quarter of a century, he was known as one of the ablest and foremost lawyers in Eastern Kansas. Mr. Lewis was devoted to his profession and was one of the first members of this Association.

A. B. Campbell was born at Rushville, Ind., in the year 1841. He did gallant service for his country in many battles between 1861 and 1865. After the close of the war he was admitted to the bar and practiced law in his native State, and in Illinois for many years, during five of which he served the people of his district as Prosecuting Attorney in an exceptionally able manner. He removed to this State in 1880, and remained with us until about two years prior to the date of his death; during which period he filled with honor many responsible, official and public positions. As an orator and in debate he had few equals in Kansas. He was a man of good impulses and his heart was large and generous. Those who best knew him loved him best. May his memory ever be with us and his virtues be not forgotten.

Respectfully submitted.

LEE MONROE,  
J. T. PRINGLE,  
*Memorial Committee.*

At the request of David Martin, who could not be present at this session, H. M. Jackson presented the following resolution, which was adopted:

Resolved: That in view of the discontinuance of the Court of Appeals on the second Monday in January, 1901, it is the sense of this Association that

the next Legislature ought to prepare a Constitutional Amendment for submission at the general election in 1900, for the reorganization and increase in number of Justices of the Supreme Court.

Pursuant to the request of the "Committee on Legal Education and Admissions to the Bar" of the American Bar Association, J. D. Milliken presented the following action of the American Bar Association at its last meeting:

Resolutions adopted by the American Bar Association August 25, 1897:

"Resolved That the American Bar Association approves the lengthening of the course of instruction in law schools to a period of three years, and that it expresses the hope that as soon as practicable, a rule may be adopted in each State which will require candidates for admission to the bar to study law for three years before applying for admission.

"Resolved That the American Bar Association is of the opinion that before a student commences the study of law, it is desirable that he should have received a general education, approximately at least, equivalent to a high school course, and that persons who have not completed the equivalent of such a course should not be admitted into law schools as candidates for a degree.

"The Association means by the expression, "A high school course," a course of study beginning at the end of a grammar school course and extending over four full years.

"The course of study referred to, would include a knowledge of English Grammar, English Composition, English and American Literature, the History of England and the United States, as well as general History, Arithmetic, Algebra, Plane and Solid Geometry, Physical Geography, Civil Government, Elementary Physics, Human Physiology, Botany and either Zoology, Geology, Chemistry or Astronomy, as the applicant selects. The candidate might be permitted to substitute a foreign language for an equivalent amount of science study."

These recommendations of the American Bar Association were referred to the Committee on Legal Education and University Law School for its consideration and report.

By request, J. D. Milliken presented a communication from Isaac G. Reed, a former member of this Association, now serving a term in the penitentiary under sentence for a crime of murder, making serious charges of misconduct against his attorney, C. J. Peckham, also a member of this Association; the result of the alleged misconduct being, as claimed, to deprive said Reed of the appeal, to which he believed himself entitled, from the judgment of conviction against him.

After discussion of this communication by T. B. Wall, J. D. Milliken, A. A. Godard, Howel Jones, E. C. Little and Sam Kimble, it was ordered that a committee of three be appointed to investigate the charges made against C. J. Peckham, and to report its conclusions to the next meeting of the Association.

The following committee was appointed under this order: T. B. Wall, Charles Bucher and J. T. Herrick.

The committee on Nomination of Officers for the ensuing year presented the following report:

*For President*—S. H. Allen.

*For Vice-President*—C. C. Coleman.

*For Secretary*—C. J. Brown.

*For Treasurer*—A. A. Godard.

*For Executive Council*—C. B. Graves, Chairman, J. D. McFarland, Lee Monroe, L. C. Boyle, McCabe Moore.

The report was adopted by the Association, and the persons named were declared elected to the offices to which they had been nominated.

It was ordered that three delegates from this Association to the next meeting of the American Bar Association should be appointed by the President.

The following appointments were announced by S. H. Allen, the President for the ensuing year:

*Delegates to American Bar Association*—Wm. Thomson, C. S. Gleed, E. C. Little. *Alternates*—W. C. Perry, E. W. Cuninghame, J. W. Parker.

*Committee on Amendments to Laws*—J. D. McCleverty, Silas W. Porter, Frank Wells, Morris Cliggett, N. H. Loomis.

*Judiciary Committee*—L. Stillwell, David Overmyer, C. H. Kimball, James Falloon, B. F. Milton.

*Memorial Committee*—J. W. Green, E. F. Ware, Geo. W. Clark.

*Committee on Legal Education and State University Law School*—David Martin, A. W. Benson, Sam Kimble, H. E. Valentine, Sidney Hayden.

The addresses delivered before the Association at this meeting appear in the following pages.

Adjourned.

C. J. BROWN, *Secretary*.



## Not to the Victors.

BY JUDGE WM. THOMSON.

*Gentlemen of the Kansas State Bar Association:*

The founders of our nationality, built and planned, with the conception of stability and permanence.

These were to be attained by the action—united and continuous—of three separate and distinctive forces. These were intended, each within its sphere, to operate harmoniously, neither hindering, usurping, nor invading the functions of the other. The plan apparently perfect in its conception, has in its execution like many things human—revealed some results, unexpected and unforeseen.

It is not my purpose to enter—with elaboration and detail—into a discursive lecture, upon the constitution of the United States and the three departments of Government, provided for by that instrument, but only, in passing, to call attention to the apparent abandonment, by the executive branch, of the duties imposed upon it, and the assumption of these by the legislative, in violation of the letter and the spirit.

The second section of the second article of that instrument provides:—that the President of the United States, “shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments.”

A hasty glance, at these provisions, reveals, that neither the Senate nor Congress, may nominate, or appoint any of the officers named therein, or to be created by law. The whole power, given to the Senate, was to advise and yield, or withhold assent, to the appointment of any one named by the President. The Senate, doubtless, in the early days of the Republic, kept

strictly within its own province. As time rolled on, the selfish desires of ambitious members of that body, in order to increase their power and manifold their influence, directed and controlled.

At length, it came to pass that there was an unwritten law, that the consent of the senatorial delegation from any state, was prerequisite to the confirmation, by the Senate, of a presidential nomination for appointment from such state, if such delegation were in accord, politically, with the chief magistrate.

The duty of the Senate, to advise, became, practically, the act of the senatorial representation in any given instance, of a single state, which act was of governing an imperious force. The centralization of this power into the hands of, at most, two senators, and sometimes of only one, soon bore its legitimate fruitage, and glaringly reveals a real departure from the spirit, if not from the letter, of the constitution.

Thus, the senators came to regard it as a rightful patronage, appertaining and belonging to them, the appointment to office of residents of their respective states, whose names were suggested by them, to the executive. If thereafter, such persons were not nominated by the President, there was no confirmation. True, this condition was not brought about without a struggle, for within the memory of my hearers, one who wore the toga from the Empire state, resigned his seat because the President chose to disregard the unwritten law and with persistence and firmness, nominated a person undesirable to that gentleman.

The interpretation of the constitution, put upon it by its execution in the Senate, became "that the Senate shall nominate and appoint:" for the control exercised was so powerful, that except in the rarest instance, such a result in reality followed. The next step of further departure from the organic law, when once the first had been taken, might have been anticipated.

While the members of the lower house were given no constitutional voice, in the appointment, or selection of any officers, except for their own legislative body, they have been permitted, by the Senate to share in the distribution of the patronage; a power the latter had usurped. This was neither an act of generosity nor of grace. The senators were not unmindful, that they were debtors for their places, to the legislatures of their respective states. These legislatures were simply the aggregated results of the political victories of the congressional representative districts. A representative, therefore, was considered by a Senator from his own state, as one of the factors of his own success, and must be reckoned with by a proportional division of power over the smaller and less desirable offices. The mere formality of seeking the sanction of the President was indeed observed, for no other avenue was open for the distribution of the patronage, thus controlled and divided. The heads of departments, upon whom devolved the appointment of employees, were under the fullest dominion of the congressmen, by whose influence themselves had been appointed, and selected subordinates, at the dictation of their benefactors.

Out of such conditions, grew and flourished a system:—a system whose baleful effects upon good government were appalling. Under its regime, none might share in the appointive offices, whose credentials did not show a purchase right, by efficient party service to some chief, who assumed for the time, the power and authority of a dictator. Assistance at the conventions, or at the polls, were considerations which opened the gates of favor. The payment of assessments demanded with the boldness and brazen effrontery of a highwayman, from those already in office, was a condition precedent to a continuance in the public service. Competency, if united to opposite political faith, was rigorously barred out. Offices and places unneeded, were created and multiplied, to reward those, whose riotous clamour must be appeased. Importunate inefficiency, in the race for official recognition, easily left merit at the post. Favored unfitness invariably distanced worth. Nor was ignorance a handicap to success. The public conscience had become perverted; nor were the people shocked, when partisan service, was the only commendation for the successful seeker of a public appointment. In the Belknap impeachment trial, Senator Hoar did not indulge in extravagant flights of fancy when he said: "I have heard in the highest places, the shameless doctrine avowed, by men grown old in office, that the true way by which power should be gained in this republic, is to bribe the people with the offices created for their service; and the true end for which it should be used when gained, is the promotion of selfish ambition, and the gratification of personal revenge."

Removals from office, for no other reason than to make room for a favorite, were flagrant, and excited neither comment nor criticism. A collector, at the port of New York, celebrated his advent to power every third day, by the creation of a vacancy among employees of his own party, in which, was soon installed another, who had assisted in a factional quarrel within his own party lines. The successor of this collector, removed eight hundred and thirty out of his nine hundred and three subordinates, at the rate of three every four days. The next incumbent of this office removed five hundred and ten, out of eight hundred and ninety-two, and his successor kept up the reputation of the position by striking an average of three removals in every five days of his incumbency. So, during a period of five years in succession, collectors, all belonging to the same party, made removals for the purpose of patronage, at a single office, of sixteen hundred and seventy-eight subordinates in fifteen hundred and sixty-five days. This is but an instance. Consider that, in every department of the civil service, this same system, unchecked and uncontrolled, swayed and dominated, the magnitude of the evils resulting, may be judged and appreciated.

In comparison with this magnificent display of power, the exercise of authority by Washington and John Adams seems puerile, in occupying eight years each in the removal by each of nine subordinates. Jefferson arose to the occasion by dispensing with thirty-nine, and Madison contented himself with five. Monroe equaled Washington with nine, and John Quincy Adams

exhausted himself with two. But it was given to Jackson, the patron saint of the spoilsmen, at a single bound, to set the pace a rate of dizzy speed in those days--but highly surpassed by his more modern emulators. In the first year alone, he made seven hundred and thirty-four vacancies which were coveted by his enthusiastic followers. His reign was made historic, by the speech of Senator Marcy of New York, who, referring to the politicians of his day and especially of his own state, said: "When they are contending for victory, they avow the intention of enjoying the fruits of it. If they are defeated, they expect to retire from office. If they are successful, they claim as a matter of right, the advantages of success. They see nothing wrong in the rule, that to the victor belong the spoils of the enemy."

There is no transcendent strangeness, that this avowal, proceeded from a senator from New York, when Hammond declares that, in its early politics "party spirit had raged in this, more than in any other state of the Union." Burr asserted, "the people at the elections were to be managed by the same rules of discipline as the soldiers of an army; that a few leaders were to think for the masses; and that the latter were to implicitly obey their leaders. He had therefore great confidence in the machinery of a party." And so the evils of this system, mercenary and piratical, grew and flourished at the change of every administration. Thousands and thousands, took up their pilgrimage as to a Mecca to press their own claims or of some partisan, sometimes with imperious insolence, and again with piteous supplication, not because of any merit in the applicant, but as his share of the spoils of a prostrate foe, and of right the victor's.

The time of public officers, consumed in interviews with this mob of solicitations, and in the creation of vacancies, when search for them was unrewarded, was enormous. "Congressmen," said Garfield, "have become the dispensers, sometimes the brokers, of patronage. One-third of the working hours of senators and representatives is hardly sufficient, to meet the demands made upon them, in reference to appointments to office." And again: "The present system invades the independence of the executive, and makes, him less responsible, for the character of his appointments; it impairs the efficiency of the legislator, by diverting him from the proper sphere of his duty, and involving him in the intrigues of the aspirants for office." Again he declared, "We press such appointments upon the departments; we crowd the doors; senators and representatives throng the bureaus and offices, until the public business is obstructed; the patience of the officers is worn out; and sometimes for fear of losing their places by our influence they at last give way and appoint men not because they are fit for the position but because we ask it."

Reliable sources inform us, that afterwards, during his presidency, at least one-third of Garfield's time was absorbed by applicants for office; and that during a long period six-sevenths of the calls made upon one of his secretaries, were for office seeking.

In addition to the time thus lost to the nation's service, the strain upon the

official was a constant and exhaustive drain upon his strength, worthy of more profitable direction. Turning the leaves a little further back in our history, we learn, that in the month of April eighteen hundred and sixty-one—a season fraught with the greatest of perils—after the fleet intended for Sumter had put out to sea, President Lincoln again, during the brief respite, set himself to the task of making the new appointments. The scene at Washington, is so vividly portrayed, by Nicholay and Hay, whose opportunities for accurate, and exact observation were unsurpassed, that I am constrained, to reproduce their own pen picture.

“The city was full of strangers; the White House full of applicants from the north. At any hour of the day, one might see at the outer door, and on the stair case, one file going, one file coming. In the ante room, and in the broad corridor adjoining the President's office, there was a restless and persistent crowd—ten, twenty, sometimes fifty, varying with the day and hour,—each one, in pursuit of one of the many crumbs of official patronage. They walked the floor; they talked in groups; they scowled at every arrival, and blessed every departure; they wrangled with the doorkeepers for right of entrance; they intrigued with them for surreptitious chances; they crowded forward to get even as much as an instant's glance through the half opened door into the executive chamber; they besieged the representatives and senators, who had the privilege of precedence; they glared with envy, and grumbled with jealousy, at the cabinet ministers, who, by right and usage, pushed through the throng, and walked, unquestioned, through the doors. At that day, the arrangement of the rooms compelled the President to pass through the corridor, and the midst of the throng, when he went to his meals in the other end of the executive mansion, and thus once or twice a day, the waiting expectant, would be rewarded by the chance of speaking a word or handing a paper direct to the President himself; a chance which the more bold and persistent were not slow to improve. At first Lincoln bore it all with admirable fortitude acquired in western political campaigns. But two weeks of this experience, on the trip from Springfield to Washington, and six weeks more of such beleaguering in the executive office, began to tell upon his nerves. What with the Sumter discussion, the rebel negotiations, the diplomatic correspondence, he had become worked into a mental strain and irritation that made him feel like a prisoner behind the executive doors, and the audible and unending tramp of the applicants outside, impressed him like an army of jailors.”

For further information, delve into the reports of committees of investigation, and of the various governmental departments, so uninviting and repellant to the average seeker of truth and your labors shall not go unrewarded.

A senatorial committee, in eighteen hundred and eighty-two, informs us “that the President is compelled to give daily audience to those who personally seek place, or to the army of those who back them. He is to do what some predecessor of his has left undone; or undo what others before him have

done, to put this man up and this man down as the system of political rewards and punishments shall seem to him to demand. Instead of great questions of statesmanship, of broad and comprehensive administrative policy, either as it may concern this particular country, at home, or the relations of this great nation of the earth, he must devote himself to the petty business, of weighing in the balance the political considerations, that shall determine the claim of this friend, or that political supporter, to the possession of some office of profit or honor, under him." Continuing, this report reveals to all, the transposition of constitutional powers and duties. "The office of chief magistrate has undergone, in practice, a radical change. The President of the republic, created by the constitution in the beginning, and the chief magistrate of today, are two entirely different public functionaries. There has grown up such a perversion of the duties of that high office, such a prostitution of it to the ends unworthy the great idea of its creation, imposing burdens, so grievous and so degrading, of all the faculties and functions becoming its occupant, that a change has already come, in the character of the government itself, which if not corrected, will be permanent and disastrous. Thus hampered and beset, the chief magistrate of this nation wears out his term and his life, in the petty service of party, and in the bestowal of the favors its ascendancy commands. He gives daily audience to beggars for place, and sits in judgment upon the party claims of contestants. \* \* \* \* Every chief magistrate, since the evil has grown to its present proportions, has cried out for deliverance. Physical endurance even is taxed beyond its power. More than one President is believed to have lost his life from this cause. \* \* \* \* Each President, whatever may be his political associations, however strong may be his personal characteristics, steps into a current, the force of which is constantly increasing. He can neither stem nor control it, and much less direct his own course, as he is buffeted and driven hither and thither by its uncertain and unmanageable forces. \* \* \* \* The executive must be lifted out of this current, or be carried away by it."

In the same manner although perhaps in a lesser degree, the senators, representatives, department chiefs and every one who had the ear of a higher official, were besought, begged, bullied and threatened that they might incline to bestow their patronage, or assist in its procurement. In the dearth of places, they were created; not to aid the government, but to stifle the clamorous. Before any systematic attempt was made to overthrow a regime, so hostile to national welfare, official nooks and corners, entirely needless, were discovered for the more importunate. In the department of the treasury, there were at one time thirty-four hundred employed, seventeen hundred of whom were without authority of law. These were put into place, or stricken from the rolls, at the pleasure of the secretary, who paid them from funds, for such purpose, unappropriated. The investigation of a force of nine hundred and fifty-eight at work in the bureau of engraving, made the astonishing revelation, that five hundred and thirty-nine of these, who annually ab-

sorbed four hundred thousand dollars of the national wealth, were entirely superfluous. In other branches the discovery was made, that in some instances thrice the number of persons were employed that were needed. Places yielding high stipends, were allowed to lapse, and the salaries accumulate, and three officers were paid with the money, to do the work one could easily accomplish. Thirty-five persons were once put upon the lapse fund of the treasurer's office, for eight days preceding the close of a fiscal year, to "sop up the money which was in danger" of salvation, and return to the public treasury. Additional examples of the plundering of the exchequer, by chiefs of the dominant faction are abundant. Instances however need not be multiplied. The patriotic citizen already hides in shame, the blushes which mantle his cheek, at this harrowing revelation of official perfidy and dishonor.

Nor was it, alone, that the revenues of the nation had been prostituted to the vile purposes and abasements of designing partisans. The system struck its poisonous fangs into all with whom it came in contact, and dragged them down remorselessly to its own corrupting and revolting level.

Every incumbent, of an office, was the victim of the rapacious and predatory demands, of the ruling party, desirous of a continuity of public favor. No salary was too large, nor any stipend too small to escape the ever vigilant and alert vision, of assessors of the state and national committees. These political quartermasters, adjusted, with the precision of tax-gatherers the proportion, which must be devoted to factional purposes. Such assessments, suggested at first as fair, voluntary offerings, to procure the success of a party cause, were at last demanded, as the price of a continuance in office. Among the clerks of the departments, a reign of terror compelled them, to yield of their salaries, according to a scale fixed by political chiefs. And thus is unveiled, the pitiable spectacle, of an American citizen in the service of his country, bound supinely and forced by threats of imminent official demise, to yield his independence, as well as his wages, to associations upon whose favor his employment depended. Servility, thus engendered, was not greater in the feudal dependent, who did fealty to his lord, by approaching ungirt, and with head uncovered, and kneeling upon both knees, and placing his hands together between those of his chief, bound himself to the fortunes of the latter, by humbly saying: "I become your man, from this day forward, of life and limb, and of earthly worship, and unto you shall be true and faithful, and bear you faith, for the tenements I claim to hold of you. \* \* "

Let it not be understood, that voluntary contributions, in aid of election campaigns, even by incumbents of official position are proper subjects of condemnation; for if given freely uninfluenced by menaced disaster, this is a right which every citizen, if he choose, may without censure enjoy.

With each passing administration, such a system became more and more harmful and demoralizing. The successive helmsmen of the ship of state, became alarmed at the rapidly multiplying rocks of danger, and shoals of peril, in the surging political sea, and from time to time, at the heaving of the lead,

uttered notes of warning and distress. The hero of Appomattox, in his presidential message in the year eighteen hundred and seventy said: "There is no duty which so embarrasses the executive, and heads of departments, as that of appointments. \* \* \* \* The present system, does not secure the best men, and not often fit men, for the public service. The elevation and purification of the civil service of the government, will be hailed with approval, by the people of the whole United States." President Hayes, in several messages, made urgent demands that Congress perform its duty evident, and manifest, to reform by its legislation, administrative abuses. James A. Garfield, both as a Congressman and later as President, denounced the system then in vogue, and as debauching the public mind by holding up public office, as the reward for mere party zeal, and asserted that its reform was in the true line of statesmanship. President Arthur pointed out the duty of legislation to cure the growing evils; and affirmed his desire to co-operate in a reformation.

President Cleveland after the enactment of the civil service reform law, in speaking of the old system, averred: "Doubts may well be entertained, whether our government could survive the strain of a continuance of this system, which, upon every change of administration, inspires an immense army of claimants, for office, to lay siege to the patronage of the government, engrossing the public officers with their importunities, spreading abroad the contagion of their disappointment, and filling the air with the tumult of their discontent."

Testimony as important as can be produced was the report of a committee of the Senate, which had the civil service under its consideration in eighteen hundred and eighty-two, a year before the enactment of the reform law. Its vivid statement was, in part, as follows: "No Congressman in accord with the dispenser of power, can wholly escape it. \* \* When he awakes in the morning, it is at his door, and when he retires at night, it haunts his chamber. It goes before him; it follows after him, and meets him on the way. It levies contributions on all the relationships of a congressman's life, summons kinship, friendship and interest to his aid, and imposes upon him a work that is never finished, and from which there is no release. Time is consumed; strength is exhausted; the mind is absorbed and the vital forces of a legislator, mental as well as physical, are spent in the never-ending struggle for office."

The continued admonitions of successive Executives, and the voice of the people from the forum, loudly echoing through the halls of Congress, at last, in January, eighteen hundred and eighty-three crystallized the public will into a statute. Its purpose was to reform the abuses, growing out of the civil service. Its provisions were, briefly, that a civil service commission of three members should be appointed, but not more than two of whom should belong to the same party; thus at the outset, eliminating as much as might be, partisan bias and influence in its action.

The commission was to aid the President in the preparation of suitable



rules to carry the law into effect. The rules were to provide for open, competitive examinations of applicants for appointments, to all classified offices, subject to certain limited exceptions; that the selections should be according to the grade of the examinations; that the appointments should be apportioned to the different states, territories and the District of Columbia according to population; that there should be a period of probation before an absolute appointment; that no person in the service should be under any obligation to contribute to any political fund or render political service, and he should not be removed, or otherwise prejudiced, for refusing to do so; that he should not use his official authority to coerce political action; that no person habitually using intoxicating beverages to excess should be appointed to, or retained in the public service; that not more than two members of any one family should be appointed to the grades of service covered by the act; that recommendations of Senators or Representatives, except as to character or residence of the applicant should not be received; that no one in the service of the government should, directly or indirectly, solicit or receive for any political purpose, any assessment, subscription or contribution, from any person receiving any compensation, from moneys derived from the national treasury; that no person should, in certain governmental rooms or premises mentioned, solicit or receive contributions, or anything of value, for any political purpose; that no officer or employee, should change the rank, or compensation of another officer or employee, for failure to make, give or withhold any money or valuable thing, for any political purpose; and that no officer or employee should give or hand over to another officer or employee any money or valuable thing for any political object.

Besides, it was provided in another law, in gratitude to the defenders of the nation, that persons honorably discharged from the military or naval service, by reason of disability incurred in the line of duty, should be preferred in appointments; provided they are found to possess the necessary business capacity.

Under these provisions, according to the first report of the commission, there were, at the outset, less than fourteen hundred positions, over which control was assumed.

Increasing familiarity with its duties, and greater liberality in the appropriations by Congress, broadened the field of the usefulness of the commission, so that in 1896, the date of the last report to which I have had access, the commission had increased its beneficent dominion to more than eighty-seven thousand offices, which were, nearly, one-half of the total number of places in the civil service of the nation.

The effects of the law have been so satisfactory to the people and to the majority of the public officials who control its action, that it is already suggested by the commission, that the rules be extended so as to include all post offices of the fourth class, which reach the enormous number of sixty-seven thousand. Notwithstanding the recent assaults on the reform system by, as Senator Ingalls says, "a few—not many—but some—here and there—one,"

who are inspired by a desire, for a selfish reason, to return to a condition, which the supporters and promoters of good government may well congratulate the people is rapidly passing away, the results of the law are much more gratifying, than the corrupting methods of the past. No better commendation than the testimony of a sworn official, whose duty is to control and direct the operation of the law and which is united in its praise can, with reason, be sought or demanded.

President Arthur, after the first commission, thus bears witness: "Upon the good results, which the law has already accomplished, I can now congratulate Congress and the people; and I avow my conviction, that it will, henceforth, prove to be of still more signal benefit to the public service."

President Cleveland, after the third report, informed Congress that "The exhibit thus made of the operations of the commission, and the accounts thus presented of the results following the execution of the civil service laws, cannot fail to demonstrate its usefulness, and strengthen the conviction, that this scheme for a reform, in the methods of administering the government, is no longer an experiment;" and he commended the cause, to the liberal care and jealous protection of Congress.

After the fourth report, the same President calls attention to certain hindrances, which somewhat impede and obstruct the highest efficiency of the law. He said: "Its importance is frequently underestimated, and the support of good men, has thus been lost by their lack of interest in its success. Besides all these difficulties, those responsible for the administration of the government, in its executive branches, have been and still are often annoyed and irritated, by the disloyalty to the service, and the insolence of the employees, who remain in place, as the beneficiaries and the relics and reminders, of the vicious system of appointment, which civil service reform, was intended to displace. And yet, these are but incidents, in an advance movement, which is radical and far-reaching. The people are, notwithstanding, to be congratulated upon the progress which has been made, and upon the firm, practical and sensible foundation, upon which the reform now rests."

President Harrison, after examining the sixth report, answers some of the latter day spoilsmen, when he messaged Congress and said concerning the statute: "If some of its provisions have been fraudulently evaded, by appointing officers, our resentment should not suggest the repeal of the law, but reform in its administration."

When the eighth report was made he said: "It is not, claimed that it" (the system and its administration,) "is perfect, but I believe the law is being executed, with impartiality, and that the system is incomparably better and fairer than that of appointment on favor."

The first decade of the new order of things had passed when President Cleveland, in the examination of the tenth report of the labors of the commission, announced: "I am, if possible, more than ever convinced of the incalculable benefits conferred by the civil service law, not only in its effects, upon the public service, but also, what is even more important in its effects,

by elevating the tone of political life generally. The cause of civil service reform, in this country, illustrates how strong a hold a movement gains upon our people, which has underlying it, a sentiment of justice and right, and which, at the same time, promises better administration of their government."

A year following he added: "The advantages to the public service, of an adherence to the principles of civil service reform are constantly more apparent, and nothing is so encouraging, to those in official life, who honestly desire good government, as the increasing appreciation, by our people, of these advantages," and the people "are growing to be unanimous, in regarding party organization, as something that should be used in establishing party principles, instead of dictating the distribution of public places, as rewards of partisan activity."

That the present incumbent of the Executive chair is both by intuition and association, in full and complete harmony with the civil service reform law, is beyond dispute; as his recent amendment to the rules for its more rigid enforcement and greater efficiency, if proof were lacking, clearly indicates. The weak places in the rules by which the spirit of the law had been evaded, and which gave, color of reason to hostile attacks, upon the entire system, embraced the subjects of removals and promotions. President McKinley has already endeavored to prevent removals without just cause; and there is every reason to believe, that this is only the first step of this Executive in carrying out the suggestion of President Harrison not to repeal the law, "but reform its administration."

A few days since, in the halls of Congress, a virulent onslaught was made, upon the cause of civil service reform. The leader of this attack alleged the fact, which was undoubtedly true, that removals, in a certain department, in the year eighteen hundred and ninety-four, were made in large numbers, in some instances, for no apparent cause, and in others, with absolute injustice. The fact asserted by the assailant, and used by him as a sword, is in reality a shield of protection, to those who uphold the law's utility. Such removals were only relics and reminiscences of the age of spoils. That department was not at that time within the protecting care of the civil service law. When the civil service commission takes control of that branch of the service, aided by the new rule recently made to hinder removals without just cause, we are not likely to observe a disgraceful repetition of such arbitrary exercise of authority, to which the witty legislator referred.

The attacks, upon this system of reform, are made only by those, whose vision of the true purpose of government is distorted and perverted. They, mentally, view government and the offices thereof, as an end by which the officials engaged in its administration, are to enjoy place, and power and profit. In truth, these are but means by which a great people are assured life, liberty and enjoyment.

If men congregating together could associate peacefully and harmoniously, without this one impeding the wishes, or that one thwarting the desires of another, government would be simply an expensive and costly superfluity.

It is only the prevention of the encroachments of each member of society upon the rights of another, which demands human law, and human force behind it to insure its observance and respect. As all are interested in its proper maintenance—as a means only to the end mentioned—they have the right, collectively, to require that the best material only should be used in the public service. Ships might be made of pine, but Britain became mistress of the seas by her floating walls of oak. Of two persons, of unequal parts intellectually and physically, the public is entitled to the services of the superior, as this redounds to the common weal. But on the other hand, if the opposite contention that government itself is the ultimate end to be attained, and that its offices are, simply, places created and maintained for the sake of yielding employment to its citizens, then any selection for or exclusion from public service, would be variant from right and justice; for each and all would possess an equal right to official position.

It is said that when a change of administration occurs in England, not more than sixty of the official force of the government force is displaced. Heads of departments, responsible for the proper execution of the policy indicated by the results of the election, must indeed be in accordance with it. The thousands who have only a routine duty are left unchanged. The merit system, there, has long since passed the perils and tribulations of infancy, and has attained adult health and vigor. At its advent, it was confronted with a condition of the public service, much more deplorable, than in the republic, ever existed. It had the effect of a revolution. Neither kinship, nor title, nor wealth, unless it wear the livery of merit, can there precede the poor chimney sweep, who knocks at the door of national employment.

Under our civil service reform law, it is planned to divide the offices, proportionally, among the states, and that no consideration of party association or political affiliation of the applicants shall prevail.

So far so good; but if there be any changes made in the law, or the rules governing its administration, another step, advancing in the direction of true reform, might well be taken. Instead of blinding the eyes of the examiner to the politics of the candidate for appointment, he should learn its color and its shade. Apportion then what may rightfully be designated the non-political offices, to each party of the state, according to its proportionate vote, at the last preceding general election.

Let each candidate take his chances, with his own party brethren. To illustrate:

If the analysis of the entire vote of the State of Kansas, at the last general election, show that forty-five per centum thereof were republican, forty per centum populist and fifteen per centum democratic, the meritorious, by examination, of the republican applicants should fill forty-five per centum of the vacancies in office, those of the populists forty per centum and those of the democratic party fifteen per centum. What would follow? Behold the result. No one would doff his party dress, and don, as a disguise, the uniform of opposing politics, to increase his opportunities, for obtaining any ap-

pointive office. There would be also, no temptation to reject a candidate on account of his political faith.

By thus making the government service, a true reflection of the political complexion of all the people, it would prevent the dominant party, from controlling any election, by the use of governmental influence or power.

The palpable effects of its policy, if perceptibly beneficial to the public interests, as an object lesson before the people, would be the only advantage, which the party in the ascendant, could claim. The greatest evil, which has ever threatened the stability of democratic republics, would thus be removed. Elections would be directed and controlled, not for the expected reward of henchmen nor for the spoils to be taken from the camp of a vanquished foe, but for the sake of principles of statesmanship and good government, which would redound to the good of all and to the best interests of the whole nation.

Like the life-giving rays of the sun of a new day, civil service reform is awakening the nations and the islands of the sea. Principalities and powers, thrilled with fresh vigor, emerging from their night of demoralization and degradation, are pressing on in the race towards the goal of a higher and better civilization. Even municipalities, heretofore dominated and enthralled by the worst men and the worst principles, are reaching out after this transforming power, by which they may hope for deliverance. Great Britain and Switzerland, Victoria and New Zealand, Canada and New York, Massachusetts and Illinois have each had their battles and their victories; and today civil service reform, triumphant, sits crowned and enthroned among them all with the serpent of spoils, covered with its slime of corruption and degradation, and bereft of fangs and venom, lying dead at her feet.

Since the enactment of the law in the United States, more than one attempt has been made to repeal and destroy it. But like the wild waves of the sea, beating upon its rock bound coast, the spoils system may dash forward, recede and dash again in its angry efforts of destruction but its force shall dissipate into harmless foam and spray; FOR THIS REFORM HAS COME TO STAY. IT IS THE COMMAND OF THE PEOPLE.

In every state of the Union the conditions are improving for higher and better morals in the administration of its government. The soil of Kansas, celebrated far and wide for its surpassing fertility, is even now nourishing a tree, whose early buds of the Australian ballot, and blossoms of the law governing the conduct of candidates give abundant promise of the healthful and ripened fruit of civil service reform.

Matchless Kansas! Ever struggling in the van of all progressive movements for the betterment of mankind, sometimes halted in the way by hostile forces, but never turning backward in defeat, bearing her gonfalon, bravely in the face of danger into the thickest of battle, sometimes wounded, sometimes bleeding, but always glorious, shall, at no distant day, cast aside all the polluting and defiling rags of the habiliments of the spoils system, by which she is still invested and proudly arising in all her radiant beauty and stately majesty, shall stand forth a queen, immaculate and resplendent, robed in the pure and spotless garments, of true Civil Service Reform.

## POPULAR SELF-MASTERY.

### The Duty of Lawyers Toward Its Promotion.

F. S. GROESBUP.

I speak this afternoon to an assembly of lawyers; I feel sure that I speak as well to an assembly of men and women who deeply love their country. Were I to speak on a subject pertinent to the law as a science, or its practice as a profession, I would be sure of your attention; I trust that in speaking on a subject incomparably higher than the law either as science or profession,—the subject of our country's welfare, and our duty toward its promotion—I may arouse your interest.

The lawyer, in his relation to society, is much more than a mere practitioner. From Rome to America, the lawyer has always been somewhat of a public man; the public man somewhat of a lawyer. Cicero and Hortensius; Burke and Mansfield; Hamilton and Pinckney; Webster and Choate; these are illumined names; but they shine out from the high places of the state, as well as, from the high places of the law. Cicero, the statesman, prosecuted Verree, and defended Milo; Hortensius, the lawyer, held all the offices of the Republic from quaester to consul; Burke, the statesman, son of a lawyer, was himself a lawyer; Mansfield, the lawyer and jurist, defended the Regency Bill in the Commons against the assaults of the elder Pitt. Hamilton, the statesman, argued the cause of the Tories in the New York courts, to prevent the confiscation of their possessions; Pinckney, the lawyer, delivered the most widely celebrated speech in the most widely celebrated of American Congresses; Webster, the statesman, prosecuted the Knapps, at Salem, and pleaded the cause of Dartmouth College, at Washington; and Choate, the lawyer, sat, for many years, a senator from Massachusetts.

The American lawyer is linked with every achievement in American his-

tory. James Otis, the lawyer, fired the heart of New England, as Patrick Henry, the lawyer, aroused the spirit of Virginia, on those two days that turned the faces of the Colonists toward Carpenter's Hall, and the Declaration of Independence. Two lawyers in Virginia brought about that call from her Assembly that resulted in the Constitutional Convention of 1787; and a lawyer of New York by his lucid exposition and earnestness, secured its approval from the people. Andrew Jackson was a lawyer and judge in Tennessee, before he won his spurs as a general, or his lasting fame as a political leader; and Abraham Lincoln, the incomparable, had reached his fifty-fourth year before he laid down the law books of Illinois to take a place among the few who have really secured immortality.

The lawyer in his office, or in the courts, unravelling the intricacies of that tangled web called human life, or pressing home to court and jury those moral and historic truths that lie at the basis of all human institutions, is a figure in society, certainly the most interesting, and equally as useful as any seen in any vocation. But the lawyer devoting his talent and his training to his country, not as a politician merely and office holder, but as counsellor and leader, is in the clear upper atmosphere of his profession. Into that region I invite you this afternoon.

In the whole history of America there has been no period when the conditions of the present, and the prospects for the future were so interesting. The day now passing is unique. It sees us standing, as never before, with our backs almost wholly to the past, and our faces to the future. Parties have lost the force of sheer partizanship. With less regret than ever men swing loose from past party affiliation, and with greater ease than ever ally themselves to new political movements. Until 1890 a majority, in any political election, of thirty or forty thousand was regarded as large; a majority of one hundred thousand as phenomenal; now, a majority of one hundred thousand votes, in such states as New York, Ohio, or Illinois, is looked upon as meagre—so meagre as to be indecisive. Voters cut loose from their parties, not singly as of old, but in armies. The pendulum that marks political victory and defeat swings through long reaches and with rapidity. There is no longer any clear line of political cleavage. The generation we live in is, politically speaking, puzzled and in doubt.

The cause of all this is that we have moved forward in history. We are no longer where our fathers were when they came upon the scene; no longer where we were ten years ago. The Civil War closed a long chapter in our history. At its opening the republic had already lived for seventy years; fifty of these, in their popular movements, were dominated by the institution of slavery. Slavery as an issue had seized the moral sense of the people, and until it was settled, no side issues could find a foothold. The conscience of mankind, when deeply aroused, brooks no interference, and the conscience of American manhood was on this, as on no other question, deeply awakened.

Emancipation came. The quarter of a century that followed was given over to re-adjustments, social and economic. A vast territory had been over-

run, and all its institutions for peace and order levelled to the ground. These required reconstruction. A populous race, born into personal irresponsibility, and filled at once with indignation at their past, and with overleaping expectations for their future, were confronted, as suddenly as a flash of lightning, with the possession of one-third of the territory of the republic. The race problem, for a time, occupied our energies. The conflict had precipitated our finances into disorder; for more than thirty years we have been engaged in attempting to set them right.

But all these matters are now past or passing. For the first time in a century the ground looks clear for a new civic movement. From what corner of the horizon it will rise; what banners it will carry; who will captain it, I know not. But it will come. There is no stop to the time piece of civilization; the hand on the clock now points to a new era of political agitation and debate.

So interesting a prospect breeds both the alarmist and the optimist; the former ringing at midnight the fire bell, the latter pressing upon us at noon-tide, his potion for restfulness and sleep. The alarmist tells us that everywhere the rich are becoming richer, and the poor poorer; that the great corporations are absorbing, not only the property but the power of the country; that political virtue and personal integrity are retreating before an advancing pest of greed; that city councils, legislatures, congresses, the courts, in fact, all the depositaries of power of government, are but shambles, wherein are sold whatever the seller has to give and the purchaser is able to pay for; in short, that money is king, the Governmental institutions of our country his instruments, and the people at large his slaves. In the visions of these men we are approaching a cataclysm. Indeed, if what they think they see are not what boys—in the language of Eugene Field—sometimes see at night, nothing short of a cataclysm can purify us.

But there are alarmists of less intensity of imagination—men of thought and soberness who speak with measure and deliberation. They tell us that civilization is undergoing a rapid change; that personal independence and individuality are being swallowed up; that property under the tendencies toward combination, coalesces, so that, in time, it will come under restricted management; that in some degree owners of shares in the colossal units become different in character from men who are owners of separate properties; that the possessors of muscle and skill, under a like tendency, are surrendering to a central management what, under the old civilizations, they individually controlled; that the ultimate effect of modern machinery and organization will be to weld the man into the mass; in short, that the world, both of property and of man, is so closely linking itself together that, in time, individual responsibility, either upon the part of the man who works or the man who owns, will have disappeared.

We are told by these more sober-minded alarmists that this new state of things breeds dissatisfaction and unrest; that with our growing dependence upon others we become narrowed and belittled; that attention is now center-



ing upon material wealth as the object of existence; that the beneficiaries of good fortune are, more and more, obtruding their distinctiveness before our eyes; and that the danger is that the men who have lost in the race, or think they have lost, will soon be in a vast majority, and will exercise the power which the fact of such majority brings toward a revolutionary levelling down of what they regard as the unequal acquisitions and opportunities of life.

They bid us hold our ears to the ground if we think there is no widespread muttering of discontent; they start, at times, and inquire if those sounds against this century's evening sky are not the rumble of the coming chariot of revolution and disorder.

The blind optimist, on the contrary, sees nothing and hears nothing out of the ordinary. Preachers of discontent and agitators for change are, to his notion, only howlers of calamity, and bode no mischief more alarming than the occasional cries of the coyote here and there through the evening landscape. Wealth, he admits, is concentrating; aggressive captains of consolidating industry are gathering into their own hands the reins of what was hitherto wide-spread individual industry; men are flocking into organizations which in turn federating, concentrate their powers both of resistance and attack; and the grumbles of discontent may be heard on every hand; but, says he, wait for good times, and these misshapen apparitions will disappear as swamp fogs before a rising sunlight.

I give my voice, *on this occasion*, neither to the alarmist nor to the optimist. The rich are, indeed, in exceptional instances, getting richer; but the industrious poor are not, in my judgment, getting poorer. The material condition of the individual American is, in this generation, better than in any generation preceding, and better than the condition of any other people of the earth. Such of us as have been personally outstripped by our neighbors in the race for property are too apt, in looking after *them*, to overlook our own advance from the conditions of the past. We all share personally and materially in the advancing national wealth; in its present benefits and in the hope for the future that it inspires.

The wealth of the civilized world, after all, is only the trophy of man's triumph over nature. It measures what, from barbarism to the highest civilization, he has rescued from the forces of his environment. It belongs, not sentimentally merely, but in every day reality to every individual of the race. Compare your condition with that of your grandfather. Then, a journey across two states was the event of a lifetime and a journey across the continent the feat of an adventurer. Now, either is almost commonplace. Then, the food supply came from the neighborhood, and was diversified only by the seasons. Now the grocery store of Chicago and that of New Orleans, the market places of London and those of Calcutta, might change places in a night without revealing any striking novelty to their patrons the next morning. Then, the daughters of the nobility alone wore the fabrics of the East Indies, and diamonds and precious stones shone only in the tiaras of the great. Now,

the daughters of the people are arrayed from the looms of every continent. Beauty in every walk of life can find a fitting ornament to set off its charms. Art and literature have been liberated from the secluded galleries and libraries of our fathers. With outstretched hands they almost urge their treasures upon the world. The fascinating change of clime, the comforts and the fine arts have been made possible to all. All this the generation just passing has accomplished. For the common benefit of the people its genius has burned; for the common benefit of the people its machinery has multiplied; for the common benefit of the people its rising possessions have piled up. God has consecrated its harvests, one and all, to the ultimate service of all mankind. Neither the selfishness nor the ambition of man will profane nor displace His high purposes.

Greed, I admit, is common, and dishonesty and corruption crop out here and there in unexpected places. Legislatures have been corrupted courts purchased, and the powers of the Government, in many instances, misdirected along lines of selfishness and injustice; but these instances of degeneracy are—and I have measured my words carefully—as rare today as in any extended period of Anglo-Saxon history. They stand out more distinctively and appalling than their predecessors, because in their background is a larger and whiter general public conscience.

Nor should we permit these signs of impatience and discontent that everywhere confront us to lead us into the mistake that we are in the presence of dangers unprecedented in history. They are not entirely new apparitions, even in America. The early years of the republic were filled, not only with mutterings, but with the outbreaks of discontent. May I not step aside for a moment to recall some instructive history in this connection.

No society in these our days, enjoys a greater traditional reputation than that of the officers of the Army of the Revolution, known as the "Order of the Cincinnati." It was intended to perpetuate as our Loyal Legion perpetuates, the memory of perils endured and overcome. It held no meetings except openly, and listened to no speeches tinged with selfishness or disloyalty. It was, in every respect, a patriotic organization.

But in the days of Washington, it was denounced as a conspiracy. Demagogues pointed out that it was intended as a new order of nobility. Jealousies were inflamed; and for years, no candidate for the suffrages of the people dared to acknowledge his membership in this patriotic society. In the streets of Boston—freedom-loving, patriotic old Boston—men were publicly assaulted who carried its badge upon their lapels. It afforded the curious spectacle of the country frightened with the nightmare that the old officers of the Revolution had turned to be her enemies, and that a tyranny as galling as King George's was preparing for them at the hands of the men who had wrested them from the tyranny of King George.

Let him who believes we are in unprecedented times, turn to but one chapter in the history of New England. Industrial conditions there just before the Constitution was adopted, led to actual revolution. Every colony of

New England was a camp occupied by those bearing arms in the cause of general discontent, and those commissioned by the Government to put them down. At Worcester, at Pittsfield, at Bristol, and one hundred county seats, the high sheriff and the judges were barred in the accustomed march to the court rooms, by unflinching phalanxes of discontented farmers and mechanics. Judges were captured and imprisoned; lawyers chased from town to town; and the writs of the Government spit upon and torn up. We have seen in our own day, some physical manifestations against social order; we have seen armies of idle men tramping toward the country's capital in quest of incoherent measures of relief; we have seen colossal factories barricaded by their owners, and defended against the assaults of infuriated workmen; we have seen the business of great cities brought to a standstill, and the transportation lines of a continent paralyzed; but we never stood face to face with a social upheaval so full of menace as that captained by Daniel Shay and his followers. They still constitute our type of industrial and moral malcontents, and, for real mischief, they have never yet been outdone.

But though the despondent view, taken by the sober-minded alarmist, is not sustained by a look along the broader lines of history, it does not follow that the easy confidence of the optimist is, on that account, justified. These widespread mutterings of discontent, breaking out at intervals in sporadic uprisings, are not confined to times of distress; and do not pass away when the pressure of hard times is relieved. Breaking out here and there through the surface of established order, like fistules on the human body, they are symptoms only of an universal human disorder lying much deeper, and never, in any times, good or bad, wholly under control. The symptoms are varied, now of one character, and now of another, but the disease is constant, inherent, and incurable—nervous unrest, universal and eternal. It is a disease that even prosperity cannot cure. Indeed, prosperity frequently breeds unrest. Discontent sits in silks oftener than in rags, and feeds at the table as frequently as upon the crumbs. When prosperity comes to men and women, it stimulates hopes that the inevitable revolutions of fortune are bound to disappoint. Such disappointment is a graver personal disorder than poverty or starvation; for it is the starvation of hope. The men who starve for want of food, many and pathetic as their cases are, are counted as the fingers of one hand, compared with the hosts of men and woman who have enough. But the men whose hopes are starved; whose expectations and ambitions constantly go hungry; reach, in a countless column across every continent. I have seen men starting with nothing, hopeful and contented; growing into moderate possessions, a little less happy; and, ultimately reaching the summits of wealth, breathless from exertion, but with hands, more than ever, appealingly outstretched toward the unattainable summits of the clouds. The hunger for food breeds no poison comparable with that insatiable hunger for wealth and power.

Nor is this poison to be found among those only who seek for the supposed opportunities and power of wealth. It disseminates itself among men

who never hope to be rich, but who, in a jealous survey of their surroundings, become determined that others shall not meet with better fortune. I met a workman once who, as shearer in an iron mill, was receiving from twenty to thirty dollars for each day's labor. He had advanced to this situation, step by step, from the lowest and poorest place in the mill. But with a flash of the eyes that revealed the depth of the fires within, he announced his purpose, on one occasion, to so act that his employer's profits would be reduced though his own might, in consequence, be cut in two. A prosperous man who ought to have been happy, but unhappy, simply because another, within the circle of his associates, was outstripping him. And thus, prosperity, as well as adversity, hatches its broods of discontents that join the universal cry for something better than what one has.

The men and women of America, who, alarmed for the safety of their institutions through the past four years of hardships, lie down to sleep now, because a rising sun seems to guild the eastern sky-line may be awakened, even in the meridian, with the intonations of a rising storm. Watchfulness always, through eras of plenty, as well as periods of want—a watchfulness guided by reason and justice,—is the price at which we hold our heritage.

It is not my purpose this afternoon to take up the views of either the alarmist or the optimist, and run them out to what might seem their legitimate conclusions. Nor do I intend to point out the questions social, political, and economic, around which the spirit of unrest will probably circle.

It is enough to say that in the orbit of our national movement we are approaching the most perilous of all social and political conditions—the condition of social introspection; the condition of looking within the social structure to see how fares each one of us in comparison with his fellows. It is called by some the rising spirit of real democracy; by others, the coming of equality and righteousness; by others still, as the opening clash of the classes. It is looked upon by all sober-minded men with the interest of expectation, and the deep disquiet that, in the nature of things, must attend the traveler into a region almost completely unknown.

But the mere fact of popular unrest need not dismay us. It is, indeed, in the last analysis, the genius of human progress. The history of the race is the history of many advances, and of as many retrogressions, but the longer strides have always been upward. The face of the column is toward the crest. The lines waver—are often in full retreat—but every rise from bivouac has been higher up than the one before. This nervous, aye, this restless quality of the human make-up, has captained every march toward better things. If ever the American spirit of endeavor and advancement falls into repose, peace will be upon us; but it will be the peace of inaction and decay, not that of progress; the peace of the Spanish peninsula, not that of the English islands and the American continent. I say again, soberly and in earnest, that the mere fact of popular unrest, and the prospect of the questions it will bring, need not dismay us. These questions belong to American manhood. They lie legitimately in the pathway of the republic, and are needful to the

best development of our future. I fear no issue, no agitation, no discussion that falls upon Americans sobered by thoughtful patriotism, and cultured into a capacity to wait. To a people thus tempered every debate is progress; every public storm, howsoever charged with lightning, only a prelude to the clearing up of future skies. No real danger lurks in any abstract public problem that will ever come upon us. Reason and tolerance will, with inevitable precision, show us our way. *The unsolved problem is, not in any of the problems themselves, but in what temper the American people will go about their solution.* Right there lies the thought that I wish to make the pivot of this address.

The Greeks were accustomed to say this of themselves: "Individually, the Greeks are philosophers; collectively, they are a mob." Nor was the saying a mere epigram. It portrayed, with accuracy, the characteristics of a people, who, more than any other, have given direction and impulse to the culture of the world. It drew accurately the line between the character of Greek men and women, and the Greek nation. The characteristic persists. The Greeks today, as full of love of country, and as hopeful as any that fought on the plains of Marathon, are, as a mass, in constant imminency of riot and revolution.

The saying applies with more or less emphasis to every other race of men. It brings out clearly this pregnant truth: That the individual as an individual, and the individual, as a unit only of the nation—that the individual standing apart, and the individual welded into the mass of his fellows—are entirely separate beings; that what a nation, in a given emergency may be expected to do, cannot always be forecast by what her individual men and women, in a similar emergency in their personal affairs, would have done; that, in short, the temper of a nation on national concerns, is not necessarily reflected in the temper of its citizens in their individual concerns.

The cause of this difference is not obscure. Upon men and women as separate individuals devolve responsibilities that absorb the largest portion of their time and the best energies of their nature. Look out any moment upon the stirring mass of humanity. It appears at first like a hive of bees, or a hill of ants, intent upon some common undertaking. But settle your eyes upon one, and watch his doings. In what work is he engaged? Something that concerns his nation or his community? Not at all. He is simply building up and around himself a creation of his own. The creation may be either material, moral, or intellectual; with one a manufactory; with another, some scheme of public beneficence; with another, the product of mind put out in pulpit, forum or literature; in every instance, a creation of his own; standing apart from all things else—his own individual world. Great or small, this unique sphere is all his. It commands, by the deepest instinct of nature, his best thought, as the child commands the mother's best affection; for to his own world the world builder cannot be indifferent.

Now let those who have tried tell us how difficult it is to lead this same individual, thus all absorbed and thoughtful, out of the atmosphere of his own

creation into a participation in the interest and affairs of his nation or community. To these larger affairs he is usually hearless and sightless. It is of no consequence to point out that the larger spheres—his nation or his community—envelope his own, and that he, necessarily, is a part of them. They remain to him only the *incidents* of life; it is his own that is the end and object of life. He moves along with his own little planet in the larger systems, of which his planet is a part, as indifferent to the greater as the inhabitant of the earth is to the affairs of the solar system. Occasionally there comes from the outside a national or neighborhood shock so sharp and deep as to disturb the gravitation of his own world. Then, for once, his interests and his energies are aroused. For a time he is alive with national spirit. But when the particular disturbance ceases, the indifference to all things else than his own comes back. Indeed, the world outside the lines of our individual lives, reaches but a little way into the world we call our own. Occasionally it touches our hearts with its pathos and our sense of humor with its amusements; but while it thus entertains us, it seldom stirs us, and only on rare occasions commands our most patient and serious thoughts. It is a vexation, usually, to be called from our own little world building, with its deep absorptions, into outer affairs; and is not a vexed temper the unsafest groundwork upon which to build careful and patient investigation?

Yet patience of thought in public as in private concerns is the soul both of rightmindedness and of success. It, alone, gives equipoise and balance; it, alone, enables us to anchor upon some abiding principle or conviction until the storm blows over, the fog dissipates, and the stars of the firmament, those unerring guides in every pathway of life, come out anew. Patience of thought and patience of action, coupled with energy, lie at the bottom of the individual success of every man and woman who have surrounded themselves with a creation of their own. Without it, the house that shelters the family would never have gone up; the store-keeper's stock would never have been paid for; the law office and bank would long ago have been closed. Every successful adventure in business, literature, the arts, or professions, is a monument erected by individual patience. Self-mastery is the first and last rule of every success.

Who does not know it as the divinest quality in that deepest and tenderest of all relations, the development of the family! Is the girl wilful and capricious, fonder of bonnets than books, and giving to the dance the energy some would have her give to the Dorcas society; rebellious against kitchen things, but eager for kitchen-made things; a fugitive from parlor cleaning, but devoted to the parlor at every other hour? One does not riot over these things, and threaten to tear up the foundations of the domestic republic. Patience of thought takes pains to point out underneath these appearances, the deeper traits of character that, unfolded and developed through the orderly processes of time, will prune down the frivolities, until there only remains the full-fruited stalk of womanhood.

Is the boy wild and wrong-headed; eager always for fun; listless always at

the mention of serious things; always spending, never acquiring; of all others, great and small, the real aristocrat? One neither rails at nor arrests him. Patience of thought stops to point out that these very qualities now so seemingly unpropitious, will, when refined and rightly directed, become the base upon which is built up an energetic and useful manhood.

But put the individual to these tests outside his own concerns; subject him in national or neighborhood concerns to trials of patience and forbearance infinitely less severe, and departures as wide as these from his preconceived ideas, become, at once, not only vexations, but almost the cause for justifiable revolution. With ourselves, in our own creations, we wait for growth; outside our own creations, we tolerate sparingly anything not yet fully grown and perfected.

This atmosphere of self-control, through which we look at our own little world, is the philosophy of the individual Greek, and the philosophy of every civilized individual since. The nervous restlessness through which we look at the concerns of others, and especially the concerns of the public, excites that mob propensity that characterized the collective Greeks, and that has characterized, more or less, every collective people since. Frictions within the individual sphere are so softened and enveloped by hopeful self-knowledge, that no fire-bearing sparks escape; but the frictions of our public life, unshielded by any real reverence or respect for ourselves as a people, easily burst into conflagration.

Right here, in this difference of mental and moral attitude that the American people occupy between public and private concerns, lies the one great danger to our institutions. Beyond the need of any reform, however crying, is this need of habitual patience of thought and aptitude toward public questions. No propaganda, no Pandora box of reform can be so full of helpfulness to our national future. Changes may be needed in the direction of wider control of corporations; in the direction of a more effective restraint upon combinations and trusts; or in the direction of a more equitable distribution of the annual harvests of labor, wealth, and invention. These I will not debate. But this I say, that the republic will not endure unless, in the changes, either really or seemingly needed, we are willing to bide the time of gestation and growth. The citizen who strikes a blow at any institution of his country on account of a fault that, if found in his own family, or in his own business, would be patiently corrected, is in a dangerous public temper. It is the arousal of such hasty and intolerant temper that breeds the mob and brings on the revolution. We have seen it in our early history, when fright at its widespread ebullitions, as much as any other cause, contributed to the formation of a strong central government; we have seen it in every debate in and out of Congress touching upon slavery, the National Bank, the tariff, and other absorbing questions; we have seen it break out in our own day in an hundred cities, and along lines across the continent; we have seen it manifested every year in the nervous restlessness and intolerance that increasingly characterizes our political campaigns. It is not, I trust, temperamental, for

we are yet an Anglo-Saxon people; but unless arrested and greatly sobered it will mark our transition from a people capable of self-government, to one ruled by alternating impulses of jealousy and caprice. Every other considerable republic in the history of mankind, except that of our own, has either perished, or has not yet survived a century of time. Our own can only be saved from going the way of others by a wide diffusion of that broadest of all culture—an abiding capacity in public, as well as private concerns, to *work out* the problems presented. To leadership in such a culture I call these lawyers and public spirited citizens this afternoon. Your answer to calls like these will prove your fitness for the high walks of a profession that has never yet deserted either country or client in their hour of trial.

The prime quality of good citizenship is, after all, good sense and charity. Neither the ultra radical nor the ultra conservative can help us much.

The ultra conservative looks for the sun only in the direction where it last set, and refuses to turn for the light of his new day toward the rising sun. The ultra radical, though the sun be in the meridian, persists in searching for light from some new source round the rim of the horizon.

If the ultra conservative were to be given control of the earth's movements, her speed would be so slackened that she would soon fall lifeless into the centre of the solar system. If the ultra radical obtained control, her speed would be so accelerated that gravitation would be outridden, and a wild and uncontrollable flight through space ensue.

The ultra conservative believes in last year's summer, the fruits of which are safely garnered; he shrinks from the summer that is coming. The ultra radical would burn up the cribs and granaries that hold last year's harvest, in his abounding confidence that they were no longer needed in view of the new year's better crop.

The ultra conservative sticks to a coach and horses, because steam and electricity have, as yet, some undeveloped perils. The ultra radical runs breathless about for the imaginary air ship, and refuses to get aboard anything until this new transport is at his disposal.

The ultra conservative mourns the day of the shepherds and wishes he were in the primitive meadows, tending the primitive flocks. The ultra radical refuses all happiness this side the social millenium, when every man and woman is expected to give state dinners for a diversion.

The ultra conservative is an anchor, staying us until we are ready to be off; the ultra radical is the surplus steam, pressing us to be off. Both are, to some extent, useful; the one, to hold us down until the typhoon outside the harbor passes away; the other, to press us out of those south sea calms that give note of the coming typhoon. But it is courage and charity, in other words, self-mastered human restlessness, that conquers conditions and moves the world.

I know of no better illustration of this than is presented in the present so-called railroad situation. I refer to it only as an illustration, and choose it from among others at hand because it is the most readily presented to the



minds of all. The railroad in America had an origin different from railroads in any other country. Here, they began as private enterprises constructed out of private capital; elsewhere, they were started as public works built out of public funds. Here, in consequence, they were looked upon as private property, carrying all the rights of individual ownership; elsewhere, they were regarded from the start as governmental highways, and subject, therefore, to governmental control. The notion prevailing here was necessarily incongruous and impossible, and as the system enlarged and deeply affected every other interest of the business world, a change of view became imperative. Step by step, the courts interposed to develop the idea of their quasi public character, and the legislatures to cover them with regulations looking to the public interest. Each of these advances was attended with a demand, on the part of the radicals, for governmental control; each was resisted by a cry, from the shareholder, against legalized confiscation. Public opinion has turned neither to the radical nor to the shareholder; but, pressing onward, has arrived, now, in my judgment, close to a peace, in the wisdom and perpetuity of which the best opinion of both shareholder and agitator will concur.

The question presents an unique intricacy of antagonisms. They may be stated as follows:

First, the antagonism between the railroad company and the world at large.

Secondly, the antagonism between communities, growing out of the power of railroad companies, through discrimination, to affect injuriously, either their present enterprises, or their future prospects.

Thirdly, the antagonism between patrons living in the same community, growing out of the opportunity of the railroad company to favor one at the expense of the other; for the cost of transportation is a part of the cost of every manufacture, or commodity.

Fourthly, the antagonism between the railroad company, and the armies of men who operate its facilities.

I believe the day will eventually come when a great national tribunal, a branch of the Federal Courts, endowed with the necessary powers, executive and judicial, will take control of the whole subject of transportation. The general purpose of such a tribunal will be to see that the public are subjected to no unreasonable exactions, and private ownership to no unreasonable deprivation; that no community shall profit at the expense of another, or be injured to build up the prospects of another; that the cost of shipment to each individual of a community shall be precisely the cost of a like shipment to his competitor; that the operatives, from the general manager down, will be given an opportunity to progressively acquire an individual proprietary interest in the property they are serving, and will have a forum always in which to present any just cause of complaint.

Such a tribunal *must* be *national*; for nearly all shipments are, either immediately or approximately, of an inter-state character, and the rates entering into all, in every instance, are inter-linked with the regulation of inter-state rates.

Such a tribunal must have power, not only to reduce, but also to maintain, rates; for the rates of shipment are the key to the solution of each of the antagonisms I have already pointed out.

Creative legislation on such wide lines cannot be perfected in a day. It will require the co-operative thought and effort of men from widely different fields—of men representing the interests of the railways, of the operatives, and of the public in all its phases. But, in time, I believe, a measure will be evolved that will receive the sanction of the best public opinion, and will then go into law.

The problem has gone through all the stages between ultra-radicalism and ultra-conservatism. Had the latter triumphed, the railroad would have remained a capricious, private tribute-gatherer; had the former triumphed, it would long ago, in its opportunities of highest usefulness, have been destroyed. Public unrest at a wrong condition—an unrest self-mastered—is solving the problem. The common sense of America will, in this as in other fields, eventually conquer.

This is only an example. Many other problems, more or less advanced, have undergone, or are going through the same solution. In every instance the best results depend upon the people's capacity for courage self-restrained. The unsolved problem always is, I repeat, not in the problem itself, but in what temper the American people will go about its solution. Will it be the untutored way or the civilized way? In the former, passion is put in leadership; jealousy and spite are appealed to. Men are told in lurid language of the limitations upon their own harvests but nothing of the limitations upon the harvests of others. The untutored way seeks to kindle hate and stir up all the brood of deviltries. The civilized way is the way of self-reverence and control—the way of the man whose own child or whose own handiwork is on trial.

The untutored way catches at the first offer of leadership, as an ignorant crowd seeking an object, will run this way or that as some bawler may call out. The civilized way carefully sifts every offer of leadership, regarding each as dangerous until its character for safety is proven.

The ultimate effect of the untutored way is to dissipate what would, otherwise, be useful forces. The civilized way leads to the concentration of forces. Like an army that knows its ground, its weapons, and the point of attack, it wastes no strength upon marches upon false roads, no ammunition upon fancied enemies. The untutored way is a maddened bull with strength to conquer hundreds, but totally swallowed up in the unbridled fury with which it attacks every vivid color that is displayed. The civilized way is the skilled toreador who, husbanding his strength, watches with ready eye and patient hand for the conquering opportunity sure to come.

No finer antithesis of a high purpose dominated by passion, and an equally high purpose self-restrained and effective, can be found in history, than were presented in the lives of John Brown and Abraham Lincoln. John Brown is without parallel as an example of devotion to a purpose. Unacquainted with

fear, he was equally unacquainted with the feeling of selfishness. The mighty wrong of slavery completely absorbed him. He *could not* wait. He struck for the freedom of the slave, but in a way so misdirected, inadequate, and almost wicked, as to shock the sense of civilized mankind. An attempt at emancipation, through a widespread slave insurrection, would have, at once, aroused sympathy for the slaveholder throughout the world, and deadened the rising spirit of emancipation everywhere. In the very intensity of his earnestness he became impracticable. Like a meteor he flamed through the upper air of American politics, and like a meteor he fell, inert and resultless, except as he had quickened our affrighted senses.

But behind him rose a star, white and serene, such as never yet had been seen in the American firmament. Abraham Lincoln disclosed himself. Almost without confirmation, the career of that divine, because self-mastered, man, proves the existence of a Providence. Born in Kentucky, of an ancestry partly from Virginia, partly from Dutch Pennsylvania, and from Puritan New England, he gathered into his blood the best of every race that has stocked this continent. He was son and heir of every hardy emigrant that had fled from tyranny anywhere. His cosmopolitanism of birth was marred by no sectionalism of education. He attended no school but experience; had no instructor but Nature. He learned his lessons only from the life around him, but in active contact with every order and gradation of life. He slowly ascended the scale, but in doing so lived for a period in every condition through which he passed. From his beginning to his end, at successive stages of his life, he himself entertained the feelings and thoughts of each class of the American people. These he incorporated, one and all, into the very fibre of his own character and mentality. His soul was a mirror into which was reflected both the heights and the shaded places of universal American manhood—a book into which had been written the life, however humble, however exalted, of all the rest of us. He mastered the great questions that grappled him by knowing, with unerring certainty, the human nature out of which they emerged, and upon which they were, in turn, thrown back. John Brown lives only in a song; Abraham Lincoln lives in every pulse beat of the human race.

Passing from this individual illustration to a wider one, the antithesis between the restrained and unrestrained way of working out human destiny, is seen in a comparison of the history of the English and German people with that of the French and other Latin peoples. The French did not *grow* into individual liberty. Louis XVI had almost as absolute power as Charlemagne; the peasant of the nineteenth century could appeal to no law that was not open to an appeal by the peasant of the eleventh century. Nine hundred years had done nothing for the liberty of France. Suddenly, in a single night, a fire sprang up that levelled every bulwark of French order. Disorder, anarchy, massacre, military constraint, despotism, followed so fast that they trod upon each other's heels; each, the creature of haste; none, the giver

of any high type of civil liberty.

The history of Anglo-Saxon freedom is, on the contrary, the history of a progressive development. No generation of English or Saxon has ever lived that did not readily feel their civic condition an advance upon the condition of their fathers. Step by step, with the unfolding of the centuries, came those great guarantees of human right, the Magna Charta, the ascendancy of the Commons, and the Bill of Rights. The Anglo-Saxon did not *discover*, he *worked out* his personal freedom.

The difference of development has left its impress upon both the peoples and their institutions. Among the Latin peoples, every movement of the times, and every expenditure of energy has been toward the advance of the State as a State. Among the Anglo-Saxons, every movement has been toward the ennoblement of the individual. In Latin countries, during all time, men and women could be lawfully arrested in their homes, their property confiscated, their private papers given up to the public, and their memories searched by all the processes of menace and torture; in the land of the Anglo-Saxon, the home has always been a castle into which the sovereign could not enter. The Latin series of cataclysms has developed states; the Anglo-Saxon order of evolution has constructed freemen.

The untutored outbreaks of popular passion in France have thrown to the surface governments that, for a time, were too weak to restrain popular disorder, and, for much longer times, too absolute to fit in with popular liberty. The self-restrained development of the Anglo-Saxon, on the contrary, has worked out governments never in great disorder, and always guaranteeing the rights of personal liberty. The untutored way has meant, in a single century, in a single country, empire, republic, mobocracy, military despotism, empire, republic, monarchy, republic, monarchy, anarchy, and republic. The restrained Anglo-Saxon way has not suffered a revolution in Great Britain in two hundred and fifty years, nor in America since the republic was founded. Rapid and blood-stained breaks in social order follow the untutored way. Continuity of order and constant expansion of individual freedom, attend the self-restrained way. While the Latin peoples are stationary, England now rules over one-fourth of the population of the earth, and more than one-fifth of the territory of the earth. This republic, her descendant, holds in her hands the destinies of the Western Hemisphere. This unbroken march of the Anglo-Saxon to the conquest of the world is the trophy that the eternal ages lay at the feet of popular dignity and self-mastery.

Lawyers of America, this country is largely in your keeping. Its destiny is not secure, as long as the character and temperament of our people, present and to come, remain uncertain. It is, without doubt, a land of unexampled individual opportunity. No conditions tie men down. There is no caste. In the opportunities of our life, public and private, the mobility of the ocean everywhere encompasses us. Talent for any endeavor, though obscured at the start, amid the sands of the bottom, will, by sheer buoyancy of industry and character, rise to the top, aye, to the crest of the highest wave,

where glint and gleam, sun-crowned, the achievements of every condition of Americans.

But opportunities even like these, alone are insufficient. We must have men and women, a majority of men and women, fitted by courage and culture to adequately fill them. In the evolution of a nation's destiny the character and temperament of its people count beyond all things else. A self-conquered race alone can conquer.

We are approaching, I repeat, a new era in the world's life. The great fountains of the deep are breaking up. Africa has already yielded her deeply hidden resources and peoples to the conquering hand of civilization. There is a stir in the East. The moral purpose and intelligence of mankind are coming into an inheritance of the earth. When these convulsions are over, the nations who survive will bear toward each other a relation never known before. Wars of fire-arms and carnage must ultimately cease. I believe in the eventual federation of mankind; in a time coming when no ship will plow a foreign sea, or touch at a foreign port; when no lines of boundry will be traced by the glint of opposing lines of upturned bayonets; when no cry of wrong, whether it proceed from the low skies of Siberia, or the azure depths of the southland, will go unheard or unrighted; when tribunals will sit by permanent constitution as they now sit by special treaty, to determine the controversies of the globe. The increasing power of public opinion as an universal moral force the spread of the Anglo-Saxon tongue; the co-ordination, through the telegraph, of the political and financial nerve centers of the world; and the increasing facilities and disposition of people from every quarter of the globe to inter-mingle, are the prophecies.

But peace on earth there will never be. That human restlessness which has, from the beginning of time, found vent on battle fields, will remain undiminished, to press forward the destiny of the race. Battles will continue to take place; but there scene will be in the forum instead of the field, and their weapons forged in the armories of intellect and conscience, instead of the arsenals of fire and steel. The greatest battles of the race are yet to be met; its heroes will be, not the leaders of armies, but the leaders of public opinion; of public opinion disciplined to the sober restraints of a campaign, fought out upon the high plains of reason and charity.

## **The Pardoning Power—Its Use and Abuse.**

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BY C. G. FOSTER.

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**MR. PRESIDENT, AND GENTLEMEN OF THE BAR:**

We may first inquire, what particular function is the pardoning power intended to perform in civil government? It is a power generally recognized and ordained by all governments, and is usually vested in the Chief Executive. It seems somewhat paradoxical that the State should enact a code of penal laws, with pains and penalties for their violation, and at the same time vest in the Chief Executive the undefined prerogative of nullifying the enforcement of every penal enactment; and while this is apparently true, it would be a rash conclusion to assume that it was intended he should interfere with the strict enforcement of the law in any ordinary case. The Constitution provides that the supreme executive power of the State shall be vested in a Governor, who shall see that the laws are faithfully executed. (Const. Art. 1, Sec. 3.) It further provides that the pardoning power shall be vested in the Governor, under regulations and restrictions provided by law. (Sec. 7)

It must be apparent that this prerogative was created for extraordinary occasions that could not be foreseen and provided for by legislative foresight or judicial inquiry. Why should criminal laws be enacted if they are not to be enforced? Why are the judicial courts charged with the enforcement of those laws, if the Chief Executive, or a Board of Pardons is to sit in judgment on the proceedings and nullify them at pleasure? All governments are but an aggregation of people with a community of interest to be served and protected; each member is a part of the whole body, and the right of each member is but the counterpart of that of every other member.

If the property or person of one may be stricken down today, another's may share the same fate tomorrow. The necessity of united action for self-protection is inherent and intuitive in every community; and this idea is illustrated in crude societies, such as mining camps, where hundreds of rough men are suddenly thrown together from all parts of the world. The certainty of summary punishment for crime in such communities has made life and property more secure than under a higher civilization, aided by approved judicial systems. Every miner feels when he metes out swift vengeance for a wrong done to his neighbor that he is striking a blow for his own protection. The malefactor is the common enemy of all; and so it is that the State, as the representative of all the people, and for the whole, takes upon itself the punishment of offenders against every member of the Society. To carry out this duty, every member is compelled to contribute to the public revenues, in proportion to his property interests. A trespass on the person or property of one individual is an offense against the whole, but the injured individual has a special right to demand the enforcement of the law, and the punishment of the offender. This is the implied covenant between the citizen and the State, and for which he supports and defends his government.

Blackstone says: "Every public offense is also a private wrong. \* \* \* It affects the individual, and it likewise affects the community."

But different offenses have different results; some affect mostly the public, and others, the individual. The man who, by a false oath, obtains money from the public treasury that he is not entitled to, has offended directly against the State. The man who breaks sanitary or quarantine laws injures the public health; the man who creates a disturbance on the public street, endangers the peace and good order. These being essentially crimes against the public, the State if it chooses, may condone them; but the offender who assaults and beats an individual, or steals his property, or burns his house, commits a wrong directly against the rights of the individual, and indirectly against the welfare and good order of the community. The wronged individual has a right to a personal action for redress, as well as to invoke the power of the State to punish the offender, but the right of personal action is in no sense an adequate redress for the individual wrong, for a civil judgment for damages against the malefactor, is a hollow mockery of justice. Hence it is that the only punishment of the wrong doer is the penalty of a violated law, and the only redress to the injured citizen is the satisfaction in such punishment of the criminal. The State may forgive the offense, so far as the public wrong is concerned, but without the consent of the injured individual, it cannot fail to enforce the law and the judgments of the courts without dishonor to itself and injustice to the citizen. Our laws are not considerate enough of the rights of the law-abiding citizen who observes his duties to the State, pays his debts and respects the rights of others. Such a man should be protected and indemnified in his rights of person and property by the plenary power of the State. To illustrate my meaning: A

worthless vagabond steals or destroys the property of a citizen; the culprit is arrested and imprisoned or fined; if the fine is paid, the State deliberately puts it into its treasury, and is just so much ahead at the expense of the citizen who pays his taxes to be protected in his person and property. Every dollar that the offender can be made to pay by fine or imprisonment on every principle of right should go to the man despoiled of his goods until he is fully indemnified, and if the offender cannot pay the penalty imposed, the State should indemnify the owner, and put the culprit on public works until he has earned the value of the property destroyed or stolen. If the law stops short of that end, it fails in the duty it owes to the citizen.

The tendency of recent events in our State in the way of interfering with the enforcement of the criminal laws by a Board of Pardons is calculated to arouse a feeling of unrest and alarm among law-abiding citizens.

The statute provides for the creation of a Board of Pardons, consisting of three members. The Governor shall appoint said Board, one of whom shall be an attorney-at-law. It is made the duty of the Board "*to diligently inquire into the facts* of any case presented to them, and to report the substance thereof, with their conclusions and recommendations to the Governor." (Par. 3873.)

They may recommend the pardon of any convict confined in the penitentiary without any petition. Each member of the Board shall receive five dollars per day while actually engaged in said duties, and all expenses incurred. The more days, the greater pay!

This is a pernicious law. A tribunal of pardons should have no place in the economy of civil government among men; its very existence is a menace to good government and the enforcement of the laws; it speedily becomes a tribunal for the nullification of the laws; it becomes a receptacle into which is dumped falsehood, perjury, gossip and chicanery. It begets a system of brokerage and traffic in condoning crime. It has been said that where states have offered bounties for wolf scalps, the breeding of wolves became an industry. A Board of Pardons begets a multitude of unworthy applications for executive clemency; it usurps the functions of the judicial courts by a set of men unlearned in the law, bound by no rule of evidence, justice or common sense. It has become the usual course of proceeding for offenders against the law to fight their cases through the trial courts to the appellate court, and when finally defeated, the case appears on the docket of the Board of Pardons, who proceed to "*inquire into the facts.*" And therein lies the danger to civil government. A tribunal with a five dollar a day lawyer at its head, sitting to "*diligently inquire into the facts*" of a case which has passed through the course of a judicial trial, with astute counsel to contest every point in the case, and an intelligent judge and jury to determine the law and facts upon a full hearing of all the evidence, is such a travesty on justice and truth as should bring the blush of shame to a people who tolerate it. Its proceedings are bound by no rule of evidence or judicial precedent; it is appealed to by petitions thoughtlessly signed by hundreds of busy people



who will sign anything provided it costs them nothing. Exparte, prejudiced testimony, even public rumor are permitted to play their part in the drama. Mrs. Smith heard Mr. Jones say that he didn't believe the defendant was guilty, and Mrs. Jones says her sister thinks the punishment fixed by the court was too severe; and the local newspaper is induced to write an article favorable to the offender, and so the farce goes on. The course of judicial proceeding by which the accused has been convicted, is well known to the legal fraternity; and every lawyer knows it is hardly within the range of possibilities that an innocent man can be convicted of crime. Every safeguard and barrier has been thrown about the accused to guard him from injustice; he is given advantages the State is denied in the trial. His challenges of jurors are liberal in the extreme; each and every juror of the panel of twelve must be satisfied beyond a reasonable doubt of his guilt, and to this must be added the concurrence of the judge on the bench. The defendant may go on the witness stand, and perjure himself in his own behalf, and a man must have a poor case, indeed, who could not raise a doubt in the mind of one man out of the twelve. And here it might be well to suggest a doubt whether a law permitting a party accused of crime to be a witness in his own behalf, is a step forward or backward in law reform. My long experience on the bench leads me to believe it holds out an invitation to the accused to add perjury to his other offense, and he seldom hesitates to accept the invitation.

The law-maker who is simple enough to believe a man with the gallows or the penitentiary staring him in the face, would scruple to hold up his hand and invent a falsehood is too innocent for this wicked world. Indeed, the solemnity of an oath is too lightly considered in judicial proceedings, and a man who will lie without the oath, cannot be believed with the oath. The accused has the process and power of the State to compel his witnesses to appear and testify in his behalf, and if he is too poor to employ legal counsel, the court appoints one for him. If there is error in the proceedings which results in his acquittal, it cannot be corrected; but if there is error by which he is prejudiced, he is given a new trial. Error committed against the State should be corrected as well as error against the accused. The scales of justice should be evenly balanced, and it should not be said that the accused has been put in jeopardy unless the proceedings are free of reversible error. It may be said that a Board of Pardons is necessary to relieve the Governor of the task of investigating the merits of applications for pardons. This is a great mistake; the guilt of the accused has been settled under the proceedings, safeguards and solemnities of a judicial trial, wherein the accused and his accuser met face to face in open court, and testified to the facts, and that, too, while the events were recent and the testimony at hand. The guilt of the accused being judicially established, the question whether executive clemency should be shown in any case, is as easily decided by the Governor of the State as it can be by a Board of Pardons. The plan adopted by the Department of Justice at Washington is founded on common sense

and is worthy of imitation. On the application for a pardon being received by the President, he refers it, with all accompanying papers to the Attorney General; the latter refers it, with all papers, to the U. S. Attorney who prosecuted the case, with a request for a full statement of the facts, and also requesting his opinion on the merits of the application for pardon, and also asking for the opinion of the judge who tried the case. It may be well concluded that the guilt of the party cuts but little figure in the proceeding, for if the judge had not fully concurred in the verdict of the jury, he would have set the verdict aside, for no man is fit to exercise judicial functions who would pass sentence on one of whose guilt he had the least doubt in his own mind. If the U. S. Attorney and the Judge both concur in an adverse opinion on the application, the case stops there and the President is not bothered further with it. If either the judge or the prosecuting attorney recommends the pardon, then the papers are sent back to the President for his action. Now, it might be inferred that the President would never issue a pardon under these regulations, but such is not the case. Certain it is, however, that in whatever he does, he acts on reliable information of all the facts, and not on rumor, gossip or false statements.

Instead of a commission of pardons to guide the understanding and conscience of the Chief Executive of the State, let the sensible plan of the general government be adopted, and the Chief Executive seek his information from a reliable source. I do not wish to be understood as saying there are no cases where executive clemency should be used. Every convict who is well behaved in his prison discipline receives a liberal credit by law on his term of imprisonment, and in many instances, if his conduct shows he is likely to become a law-abiding citizen, he should be restored by pardon to his civil rights. And it frequently happens that events occur which call for the exercise of the pardoning power, when the accused has been properly convicted, and to meet such emergencies, is evidently one of the purposes of granting such power.

In this connection, it may not be amiss to say a few words on the subject of capital punishment. In my opinion, there are several crimes which the State, in the protection of its citizens, should punish with death; treason to the State, premeditated murder, rape, and train robbery should forfeit the life of the offender. I make some claim to the sentiment of humanity for mankind, and every living creature, but humanity and mercy are first due to the innocent and the upright. Humanity for the oppressed, not for the oppressor; the inexorable demands of justice may not be thwarted by false or maudlin sentiment. Justice wrongs no man, but gives every man what is his. Let us worship at the shrine of the blind goddess who holds aloft the scales and the sword; let us cling to her as the mariner clings to his storm driven bark; let us hold fast to her as the dying Christian clings to his cross. A truly humane man is a devotee of justice. Young says: "A God all mercy is a God unjust." The man who can deliberately take the life of his fellow

man, or by force rob an innocent girl of that which is dearer to her than life, is a creature in the similitude of a man, but at heart a demon, and his life is not worth prolonging. There can be no good purpose served, either to himself, or to the community, in continuing his existence. The folly of shutting such a man up from his fellows, feeding and clothing him, and appointing a man to guard him with a loaded gun to prevent him from doing further mischief, is not humanity, but a maudlin sentiment, and tends to breed that class of malefactors. Let us have a healthy sentiment in dealing with criminals. Compromising with sin is little less than a crime, and indicates a decadence of the moral sentiment of a community, and will eventually undermine the State. So long as folly is not a crime, there will be silly women who will carry flowers and sweetmeats to the wretch who has ravished a sister or murdered a wife, but, thank God! it is not such shallow pates who represent the moral sentiment of the people, or to whom is given the task of enforcing the laws!

"Teach me to feel another's woe,  
To hide the fault I see,  
That mercy I to others show  
That mercy show to me."

Besides the uncertainty of the law, the great evil of the present day in the administration of justice, both criminal and civil, is the shameful delay and great expense. The demand for economy and dispatch is as inexorable as justice itself; to deny a suitor his right for years, is a reproach to the State or Nation, and to permit criminals to baffle justice for years by technicalities is simply an outrage on a law-abiding people. No people on earth will tolerate so much trifling with law and justice as the Americans. We had grown to believe from Dickens' story of Jarndyce and Jarndyce that a case in the courts of chancery of England was simply interminable; but the progress of the civil and criminal law in the courts of England today puts us to shame, and what is more to their credit, no matter how high the offender's social position or wealth, he cannot escape speedy punishment. Late instances were the cases of Oscar Wilde and Dr. Jamison. In Spain, the slayer of the Prime Minister, Castillo, was convicted and executed in twelve days after the murder. In our country, it would have taken five years, and the expenditure of thousands of dollars. Why this is so, and what is the remedy, are questions too lengthy to discuss in this paper; but the chief offenders, I am compelled to say, are the members of the legal profession themselves; and crowding close after them, are the judges on the bench; perhaps the latter are the more culpable, for they have the power largely to correct the evil. Legislators must also share the blame, for a remedy, in a great measure, could be found in legislation.

I cannot close without saying a few words to the young lawyer entering his professional career. I have been there, and know by heart his hopes, his ambitions and his aspirations, and he has my profound sympathy and good-will; but let me warn him against the siren whose seductive songs lead him to

prostitute his talents to thwarting the ends of the law, and the crucifixion of truth and justice. No man should make merchandise of his conscience; it is no glory in the opinion of right thinking men that an attorney has aided to defeat the ends of justice, and acquit a criminal. The lawyer is a member of society, and is as much interested in punishing crime as the man who preaches the gospel, or who administers to the sick and the suffering. I do not mean to say that a lawyer should not defend a man he believes to be guilty; the constitution guarantees to every man charged with crime the benefit of counsel; but let that defense be fair and honorable; let it fairly bring forth every mitigating fact for the accused, but when it reaches the limits of justice and right, let him pause and say: Thus far shalt thou go, and no farther.

## The Jury System.

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BY W. G. HOLT.

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The jury system has been so long established as an essential part of the administration of the law, its necessity so fixed in the mind of the average person and its functions held so sacred by the courts in general that it seems almost sacrilegious to criticise, and a vain consumption of time to commend it. But with an advancing civilization and a transforming of methods in every activity tending to the obtaining of more perfect and satisfactory results from a combination of highly cultivated minds and more approved methods of operation, the means adopted for the due and proper administration of the law should be in harmony with the newer methods adopted in other walks of life, keeping pace with the progress of the age, and should not carry us backward instead of forward. To that end, therefore, I shall attempt to offer a few suggestions for the betterment of a system which, although handed down to us from an age of which we are not in many things particularly proud, and a system which we are every day misfitting to the demands of an enlightened and advancing civilization, yet is not wholly wrong in principle.

This system is found in the primitive institutions of nearly all early nations, in a greater or less degree, and it is impossible to say with accuracy from whence it came. In the night time of the history of the Anglo-Saxons, which will be far enough back to go for the purposes of this argument, there were no forms of judicial procedure. When a complaint was made or a crime committed, a messenger was sent to the neighborhood in which the con-

troverſy aroſe, to ſummon the people of the Hundred, who had ſome knowledge of the facts and of the parties, and who ſhould decide the controverſy of their own knowledge. No witneſſes were ſworn, but to the aſſembled people, who knew the facts, the parties ſtated their caſe. The jurors were judges of both the law and the facts, and the verdict was baſed upon the perſonal knowledge of thoſe who ſerved as jurors. As the people advanced in the ſcience of government and of the adminiſtration of the law, evidence was received upon the trial of caſes, and the practice of allowing juries to take into conſideration their perſonal knowledge of the facts was gradually diſcountenanced, until finally it was entirely aboliſhed. The power of juries to decide queſtions of law as well as queſtions of fact was taken from them at an early date, and through all ſucceeding years the ſyſtem has remained the ſame, without any very ſubſtantial change.

The jury ſyſtem has been often criticiſed on account of verdicts rendered in ſome caſes; but becauſe one jury has failed to fully comprehend a caſe, or has wilfully failed to perform its ſworn duty, is no good reaſon why all juries ſhould be condemned, for I undertake to ſay that there are far more juſt than unjuſt verdicts rendered. It is ſaid that a judge, or bench of judges, learned in the law, with trained minds, experienced in following evidence, weighing testimony, and competent to detect the ſophiſtry and fallacy of an argument, will more nearly arrive at the truth of a controverſy than twelve inexperienced men, choſen from the various trades and occupations. Of courſe if this ſtatement is correct, it would be much leſs expenſive and more ſimple to try a caſe to a court than to a jury; but however much weight there may be in the argument made in favor of judges trying diſputed queſtions of fact, I am not prepared to ſay that it is the better plan. Judges are human, like jurors; they have ſympathies and prejudices; their reaſoning is not always correct, and therefore they do not always arrive at correct concluſions. They are not infallible, and often err in their judgment. But the ſame may be ſaid of jurors, and after all it is but the criticiſm of one defective human mind of another, and we may as well be honeſt with ourſelves and ſay that perfection cannot be obtained, and we will endeavor to ſo improve the preſent methods as to ſecure the beſt poſſible reſults.

Whatever defects there are in the jury ſyſtem, the bench and the bar of the country are largely reſponsible for them, and continual complaint ſhould not be made of an evil when the complainant does nothing to remove the evil or better its condition. No ſound argument can be made that will juſtify the ſelection of a man who is inexperienced in human affairs, unintelligent, of known prejudices, a ſympathizer with certain kinds of crime and of doubtful character, to be ſelected as a juror whoſe duty it is to determine the guilt or innocence of one accuſed of a public offence, or to find the right of a civil controverſy; and yet ſuch a thing is not only poſſible, but often occurs, under our preſent method of ſelecting jurors.

Under the jury law now in force in this state, the township trustees and mayors of cities not included within a township are charged with the duty of selecting, from those assessed on the assessment roll for the preceding year, one person for every fifty inhabitants within their respective townships or cities, as the case may be, whom they deem suitable persons, and who have the qualifications of electors. In making such selection, they are to choose only those who are not exempt from serving on juries, who are possessed of fair character and approved integrity, who are in possession of their natural faculties, who are not infirm or decrepit, who are well informed and free from legal exceptions, who have not, either in person or by any other means, solicited their selection as jurors, and who have not served as jurors in any capacity at any term of court during the year next preceding. This law was passed in 1876, and stood without change until 1887, when the legislature amended the law by providing that three commissioners should be appointed by the governor, in counties having a population of thirty thousand and upwards, who, instead of the township trustees and city mayors, should select the jurors. When the governor appointed proper persons, the operation of this law was a marked improvement over the old law, but at the last session of the legislature this act was repealed, and jurors are now selected in all counties in the same manner.

The conditions of the state have materially changed since the passage of our jury act. Then we had no large cities nor populous townships. Then a township trustee or a mayor of a city knew every tax-payer or person suitable for a juror, within his jurisdiction. But now the situation is quite different, at least in the larger cities, where it is incumbent upon the mayor to select each year, at least in one instance, about one thousand persons for jury service. It is not to be expected that any mayor has such an intimate acquaintance with the persons whose names he finds on the assessment rolls that he can select from among this number even half a thousand persons who possess the qualifications contemplated by the law, and as a consequence the selection must largely be at random. The same may be said of mayors of the smaller cities and of trustees of populous townships, and hence where the spirit and object of an act cannot be fulfilled or substantially carried out it becomes a source of continual wrong, and ought to be repealed and such a law passed that will meet the requirements of the situation.

The whole body of the tax-payers is placed at the disposal of the law, and the very importance of a trial demands that the best material be chosen. No restrictions of any kind or nature are placed upon the selecting power. If, within the number of the tax-payers, there are men more competent than others for this important duty, they should be chosen. To be able to select such persons requires not only an intimate personal knowledge of the person to be selected, but a thorough knowledge of the duties of a juror and the elements necessary for the proper performance of such duties. The ability to make such selection is not one of the things an elector thinks about when he

casts his vote for a person seeking to be a township trustee or the mayor of a city. He considers only whether the candidate is competent to manage the affairs of the township or the city, as the case may be, and further than that he does not inquire. The duty of selecting jurors is wholly foreign to the purposes of the office of a mayor, or trustee of a township. They seldom come in contact with the courts, and have no opportunity of learning what the duties of a juror are, and what elements he should have and what he should not have, in order to be competent to sit as the exclusive judge of the facts in a case; and hence it is a mere guess whether the person he selects is the kind of person which the framers of the law intended should be drawn as a juror. It would be far better if a person or number of persons were appointed by the court, whose sole duty should be to make a full investigation of each person eligible for jury duty, whose name appears on the assessment roll, and make a record of the result of the investigation for the inspection of the court, and from this list, with the advice and under the direction of the court, select a sufficient number of persons for jury service. The persons so appointed should receive a reasonable compensation for their services and should have an extensive acquaintance with the people, and the jurors so selected should not be subject to challenge on account of having served as jurors at any time prior to the time of their selection.

If the present method of selecting jurors is to remain and the people are to submit all the controversies which find their way into the courts to twelve persons drawn from a class of society with minds the most plastic and the most subject to prejudices and animosities, then that section of the code of civil procedure which provides that a juror may be challenged on suspicion of prejudice against, or partiality for either party, or may be challenged for any cause that may render him at the time an unsuitable juror, ought, in the furtherance of justice, have the most liberal construction by the courts, and jurors should be subjected to the most rigid and extended examination, and if there be a suspicion of prejudice against or partiality for either party, or if it appears from the examination that the juror is of the same nationality, religion, fraternity, business, occupation, trade or profession, or has a like cause of action against another party, or is interested in a like cause of action, from which it appears that the juror would be likely to lean toward one side or the other of the case, he ought to be held an unsuitable juror, and the court ought not to require the proof of such fact to be very cogent, but it should be sufficient if there is a likelihood that the juror's judgment may be influenced in considering the testimony by prejudices or sympathies resulting from associations of any kind or nature. Neither should the court require that if the juror has formed or expressed an opinion about the merits of the case, such an opinion should be a fixed opinion, before sustaining a challenge for cause. The necessity of this rule becomes more apparent when we consider what an incomprehensible thing a human mind really is, and how little actual dependence can be put in the accepted theory that from



a certain state of facts all reasonable men must arrive at the same conclusion. If all men were reasonable according to a fixed standard of what constitutes reasonableness, then the theory might work out in practice, but as the standard is left to be fixed by each person for himself, the conclusion reached necessarily partakes of the imperfection of human reasoning, to the extent that the mind employed is wanting in the power of orderly and logical arrangement, or is influenced by conscious or unconscious agencies.

It is provided in our jury law that a person who has served as a juror in any court of record cannot again be selected as a juror until after the expiration of one year from that time. The object of this law is to abolish the office of a professional juror. Now the professional juror is generally to be found lounging around the court room, with the expectation of being summoned as a talesman, but the code effectually prevents him from sitting in more than one case during the term; and besides, there is ample power in the court to exclude him from every case, and the court no doubt would do so if it were convinced that the person was a professional juror. So that there need be no law which robs the court of its most valuable adjunct in order that the professional juror may be excluded, when such a law is wholly unnecessary and hurtful. Jurors are generally honest men, but they are inexperienced in deciding controversies. Their minds are receptive, and retain improper impressions which experience would teach them to easily cast aside. Knowing this, the pettifogging lawyer has more success at the commencement of a term in getting verdicts than he has toward the close of the term, and this although jurors may do the best they can to do justice between the parties litigant. But they are inexperienced, and their position in life does not permit them to disassociate themselves from the things that they have not yet learned are not facts upon which a controversy is to be decided, and, although unintentionally, injustice is often done through an inability on their part to cast aside irrelevant matters.

It is provided by the code that when the jury has been sworn the trial shall proceed in the following order, unless the court otherwise directs: First, the party on whom rests the burden of the issues may briefly state his case and the evidence he expects to sustain it. Second, the adverse party may briefly state his defense and the evidence he expects to offer in support of it. The provisions of the code of criminal procedure are substantially the same, except that the defendant is not required to state his case until the evidence for the State has been offered. These provisions have been literally followed and rigidly enforced by the courts, but that they do not lay down the true rule must be obvious. It must be remembered that there are twelve minds waiting to discover the right of the controversy about to be tried. No brief statement of the case and the evidence by which it is to be sustained will sufficiently prepare these minds for a proper and thorough understanding of the battle of law and facts about to be fought, so that they may know the proper value to be placed on the evidence as it is received, much less if there

is no statement at all made. And instead of giving a party the option of leaving the jurors in ignorance of the nature of the controversy and letting them grope around in the dark through a mass of evidence, or of doing little better in the brief statement that is usually made, the law should be that the very fullest statement of a case and the details of the evidence should be made at the beginning of every case. Before any evidence is received, the attention of the jury should be directed by the court to every point in the case in dispute, and they should be informed by the court of the general principles of law which govern the case, so that the proper value of the evidence would be registered in the minds of the jurors as fast as it is received by them; and after the case has been tried the court should again fully instruct the jury as to the rules of law governing the case, and again direct the attention of the jury to the evidence to which each rule of law is applicable. During the trial of the case, the greatest facility should be used to bring to the minds of the jurors every phase of the case, especially time, distance, location and other objects and matters requiring descriptions. Correct drawings, maps, photographs and measurements should be required to be produced. Time should be taken to properly present the case fully. No unreasonable delay should be permitted, but the administration of the law is an expensive necessity, and no judge can run a cheap court and do exact, substantial and impartial justice to the parties who, unfortunately, are compelled to seek redress through the operation of the laws. An over-anxious desire to save a few dollars for the tax-payer may result in a great loss to one of the parties to the action. A trial should be more like a school of instruction to the jury. Every appliance known to human skill should be by law required to be employed to bring clearly before the minds of the court and jury every fact in the case. The jury should not be required to guess at anything, nor to supply a missing fact, or an indistinct description of some fact from sources other than from the evidence. A court room should be supplied with every facility necessary for the proper presentation of the case. The jury should not be expected to sit through days and weeks of the trial and be expected, with minds wholly unused to such an ordeal, to remember, without assistance, every detail of the evidence. It is all that the trained mind of an experienced judge and the counsel familiar with the law and the facts can do, and jurors should have such agencies as would enable them to have the whole case before them when they deliberate upon what their verdict shall be. Such a course of procedure may be expensive but it is much better expensive than be an injustice.

It is now essential to the validity of a verdict that the jury should be unanimous. It is difficult to find any good reason why this requirement exists in this country, where the voice of the majority rules. We demand twelve honest, intelligent, thinking, capable men to try our cases; we have them sworn to well and truly try the matters submitted to them and a true verdict give according to the law and the evidence; they are required to find a unan-

imous verdict, and in order to do so must agree on every disputed point in the case. While it is possible in some cases, yet it is against human experience to believe that in the large majority of cases where a verdict is found the jurors' minds have met and agreed on every issue in the case. Unless, after reflection, a juror became convinced that he was in error as to the first conclusion reached by him, it matters not from what consideration he is induced to change his vote in order that a verdict might be rendered. Neither does it matter that he may be wrong in his first conclusion, if he changes his vote while in his own mind he still believes otherwise, he violates his oath as a juror. Such is the inevitable result of requiring a unanimous verdict. And, on the other hand, if one juror, who has the courage of his convictions, disagrees with his fellow-jurors, a verdict is prevented, to the injury of the administration of the law. The president, vice-president and all civil officers of the United States may be removed from office on impeachment for and conviction of treason, bribery or other high crimes and misdemeanors. The trial of the impeachment charges is by the United States Senate, and two-thirds of the members present may convict. In such case the senators are no more than a jury; they hear the evidence and arguments of counsel and can convict the President of the United States of any crime known to the criminal law and deprive him of the highest office in the gift of the people without finding a unanimous verdict. And yet this provision has stood since the fourth day of March, 1789—the day on which the Constitution of the United States went into operation—without objection, and exists today as a testimony of the great minds which framed that matchless document.

Coming closer home, we have the seal of the approval of Kansas' sponsors, of that document, in the provision of our Constitution which permits the removal of the governor and other state officers upon impeachment for any misdemeanor in office, and conviction by the concurrence of two-thirds of the members of the senate.

In 1889 the legislature passed an act providing that, Whenever the legislature is not in session, officers of charitable, educational or penal institutions may be charged with certain offenses affecting the management or administration of the institution, and the truth of the charges tried by a committee of five members of the legislature, and decided by a majority vote of the whole number of the committee; and it is the duty of the governor to dismiss from the public service the officer named in the complaint, if the committee find him guilty. This body, although named a committee, yet possesses power to compel the attendance of witnesses, and from the evidence produced before them, by a majority vote, decide whether or not an accused person shall forfeit a valuable office, for misconduct.

In appellate courts, a majority of the judges decide all questions, both of law and of fact, properly coming before them, sometimes deciding questions of fact by a majority of the judges, which required the unanimous verdict of the jury in the trial court. Other illustrations might be given, where less

than the whole number constituting the tribunal decides questions coming before it as important as any question coming before a jury. Except the petit jury, there is not a body or tribunal in this State which is required to come to an unanimous conclusion in order that the personal or property rights of a citizen may be determined. It would seem that when the president of the United States and the governor of this state may be required to forfeit their offices by the verdict of the jury provided by law to try them upon impeachment, a controversy involving infinitely less important considerations might safely be decided by a concurrence of two-thirds of the number constituting the triers of the facts, if not by a majority.

It is easy to criticise and condemn, but seldom, if ever, is the voice of the critic raised to point out the way in which the error may be avoided. No one contends that the jury system is perfect, and as a result verdicts have been rendered which shocked the sense of justice, but it is not easy to find any good reason that justifies the trial court in letting such a verdict stand, and where such a thing is done we are forced to conclude that the case was never properly presented to the court or the jury, or else the judge who presided at the trial had no proper conception of his duty. A conscientious judge, who is a judge in the full meaning of the word, knows full well whether the jury has done its duty and found its verdict according to the law and the evidence. There is always some reason which is apparent to the judge why a jury renders a verdict that shocks the sense of justice. Knowing, then, that fact, his duty is plain, and no consideration should, for a moment, swerve him from its full performance. He stands as the second jury. His decision on the facts is final, as it should be, and before fixing so irrevocably the liabilities of the parties to the action he should be sure that what the jury has said meets fully his approval. A great many things conspire to lead a jury away from the right path for them to travel in in order to find a true verdict. The judge knows what these things are. His experience at once points them out to him, and while it is impossible for him, during the trial of the case, to sweep all of them away, yet when he sees by the verdict that they have misled the jury, he should, if the verdict is such as to shock his sense of justice, at once set it aside, without waiting for the filing of a motion for a new trial, and frankly tell the jurors his reasons for so doing, in order that they may see the error into which they have been led, so that they may avoid a like occurrence in some other case. The trial judge should guide the jury through the different places; he should be in touch with his jurors; they look to him for guidance and he should not fail them; they know his duties full as well as he knows theirs, and they keep a watchful eye upon their verdicts to see what the judge thinks of them. If he approves an unjust verdict, he misleads the jurors, and in a similar case they would find justification for a similar verdict in the refusal of the judge to do his duty. No other voice in a case is so potent as the voice of the court. No jury can properly judge of the facts and weigh the evidence without the assistance of the judge, and if he removes himself so far from the trial that his only office is to pass upon legal questions

arising during the trial and casts the entire burden upon the jury, it cannot justly be said, if an improper verdict is rendered, that it was wholly the fault of the jury. Although the jury is the exclusive judge of the facts proven and the weight of the evidence and the credibility of the witnesses, yet that does not relieve the trial judge from the full performance of his duty to assist the jury to arrive at a correct conclusion by the proper instructions. He stands, or should stand, as the restraining and correcting influence during the trial. While largely independent, yet the jurors give great weight to what he says, unless, by his conduct, he has forfeited their confidence, or has created one sphere for himself and one for the jury. He should hold the scales of justice with an even hand and not try one side of the case, but both sides. Neither should he usurp the province of the jury, nor set his opinion against theirs unless to prevent manifest injustice being done. But as a separate branch of the administration of the law from that of the jury, and as both exist and are deemed to be essential, there should be a close union of the duty of the judge and the duty of the jury, to the end that the jurors should be impressed with the full sense of their duty and held to a strict accountability for the proper discharge of the duties of their office.

If, therefore, the power of selecting persons for jury duty is placed in proper hands; the opportunity of selecting an impartial panel presented to every litigant; the minds of the jurors constituting the panel so prepared that they may receive the evidence understandingly and in an intelligent manner; the facts constituting the cause of action and defense brought before the jury in their every detail; the rules of law so applied to the evidence and given to the jury that it may have no misunderstanding as to who shall be entitled to a verdict, when the weight of the evidence is found; a judge who knows his duty and has the courage to perform it, then no stones can be flung at the jury system, and if justice is not done, the fault will not be found in the triers of the facts

## **The Law of Impeachment.**

BY F. L. WILLIAMS.

The remedies offered by the law of impeachment are not held in esteem by lawyers, who have studied the history of trials of impeachments, and who understand the rules of law applicable to such trials.

The law as it exists in England, and the United States is designed to reach the delinquency of public officials. The power of impeachment is maintained that it may enable a government to purge itself of dishonest officials, who by reason of power and influence may not be reached by trial in ordinary criminal courts. Another reason for the maintaining of the power in England is that a trial by his peers may be preserved to every subject. The supposed high degree of the Court trying an impeachment, was most happily expressed by one of the managers in the trial of Lord Macclesfield in this language: "When the Commons are prosecutors and Your Lordships judges, the meanest subject will have justice, and the greatest will not find favour." Whatever the design, in practice, the law has usually been invoked by motives of jealousy and envy, or is made to subserve some sinister political purpose.

The power of impeachment is given by the constitution of the United States, and by the constitution of our State, but the procedure is no where marked out, and the Court trying the impeachment is guided by precedents established in other trials and by the rules governing analogous questions in trials of indictments in criminal courts. The procedure in an impeachment trial from its beginning is analogous to the trial of an indictment in a criminal court.

An indictment is a presentment by a grand jury. An impeachment is a

presentment by one branch of the legislature. The indictment is tried by a criminal court. An impeachment is tried by a branch of the legislature sitting as a court. The prosecutor of an indictment is the attorney for the State. The prosecutors of an impeachment are the managers appointed by and from the impeaching body. The process for bringing evidence before the Court is the same in each case, and in the famous impeachment trial of Warren Hastings, the House of Lords established the precedent that admissibility of evidence should be governed by the rules of the inferior Courts of the realm; and in the impeachment trial of Judge Samuel Chase in the United States Senate, in 1804, the precedent was established, that there could be no conviction upon impeachment unless the offense charged was also indictable, and punishable in the criminal courts. A study of the leading impeachment trials shows that the rules and practice of the courts trying impeachments conform more and more in each succeeding trial to the rules and practice of the inferior criminal Courts.

In this growing similarity may be found one of the reasons for a discontinuance of impeachment trials. If the offending official is to be tried according to the rules of the ordinary trial Courts and can be convicted only when his offense is indictable, what sound reason can exist for maintaining the power and continuing trials by impeachment? The managers of an impeachment trial are usually appointed to conduct the prosecution because of deep-seated interest in securing conviction, and the prosecution in such cases might better be called persecution. The prosecution conducted in the ordinary Courts by a State's attorney is more in accord with fairness and justice and more becoming in dignity, more effective in its results than the prosecution of a board of managers whose chief qualification usually lies in the desire to punish a political opponent. The trial judges of our ordinary Courts are usually men of well trained legal minds, capable of rising above prejudice and passion and the trials of indictments before them are conducted with dignity, fairness and ability unknown to Courts trying impeachments. The weakness of England's House of Lords, sitting as a Court trying the impeachment of Warren Hastings called from Macaulay a criticism in these words:

"In truth it is impossible to deny that impeachment, though it is a fine ceremony, and though it may have been useful in the seventeenth century, is not a proceeding from which much good can now be expected. Whatever confidence may be placed in the decision of the Peers on an appeal arising out of ordinary litigation, it is certain that no man has the least confidence in their impartiality when a great public functionary, charged with a great state crime, is brought to their bar. There is hardly one among them whose vote on an impeachment may not be confidently predicted before a witness has been examined; and, even if it were possible to rely on their justice, they would still be quite unfit to try such a cause as that of Hastings." \* \*

If Macaulay was justified in passing such strictures upon the House of Lords,

what might be said of the Law Lords of our "Kansas Parliament," or of the Senate of any State sitting as a trial Court.

Besides, the results to be attained are more speedily reached in the ordinary trial Courts. Impeachment trials are usually so long drawn out that prosecutors, defenders, Courts and even culprits lose interest in their proceedings. The trial of Hastings lasted for more than seven years, and of the trial he himself said: "I was arraigned before one generation and the judgment of 'not guilty' was pronounced by another."

If there were no other defects in the law, the long delay from beginning to the end of such trials, would bring it into disfavor.

But there are other defects in the law. I have said that it was designed to reach the delinquency of public officials, and I have said that it has usually been invoked to subserve some sinister political purpose. The leading impeachment trial of the United States is a striking illustration of such misuse of the law, and that case is wonderfully illustrative of the many defects in the law of impeachment; I refer to the impeachment and trial of Justice Samuel Chase, Associate Justice of the United States Supreme Court. This trial is a land mark in American history and this address cannot omit comment upon it. It occurred in the days when the party of Jefferson with its strict construction and States' rights doctrines was in ascendancy. The one thing that stood between the strict construction-States-rights party was the federal Judiciary made up of staunch federalists like Justice Chase and Chief Justice Marshall. These were men whose theory of the government in respect to its central power and the limited powers of the States was diametrically opposed to the Jeffersonian party. It was the Supreme Court that stood in the way of Jeffersonian reforms. Chief Justice Marshall and the Supreme Court could overturn strict construction doctrines faster than Congress and the President could set them up. Under these circumstances there was great demand with the administration for a reconstruction of the Federal Judiciary.

The plan adopted by the administration to accomplish this was to remove objectionable members of the Supreme Court by impeachment. The theory held by the administration, for that purpose, was that an impeachment and a removal from office need not imply criminality; it was merely a declaration by Congress that a Judge held dangerous opinions which made it necessary for the public safety that another man should be substituted for his place. Under this theory the Senate was not to be considered as a Court of Justice, but simply a part of the constitutional machine for making appointments and removals. John Randolph, of Virginia, became the leader of the Administration impeaching forces, and while Randolph was reaching out to clutch the throat of John Marshall, he began the application of his theory of the law by the impeachment and conviction of Judge Pickering of New Hampshire.

Judge Pickering was an imbecile, friendless and almost unknown. When



impeached he did not appear for trial. The Senate voted for his conviction and the summary process of the trial amounted to nothing more than an expulsion from office. This case, however, served as a precedent for Randolph's theory, and impatient to accomplish the object of his plan he next moved the impeachment of Justice Chase.

Articles of impeachment were adopted and the trial began before the United States Senate. A recent biographer gives us a glimpse of the trial in these words:

"A summary vote of expulsion from office, feasible enough in the case of a friendless, absent, unknown and imbecile New Hampshire District Judge, was out of the question when a venerable Justice of the Supreme Court appeared at the bar of the Senate, backed by a body guard of the ablest lawyers in America who were considerably less afraid of Congressmen than Congressmen of them. There could be no summary process there. There must be a regular, formal trial, according to the rules and principles of law. The Senate must be a Court.

"For an inquest of office, Randolph was, perhaps, as competent as another, but that a Virginian planter, who occasionally sat in a grand jury, should be vain enough to suppose himself capable of arguing the most perplexed questions of legal practice was incredible; and when, in addition, he was obliged to fling his glove in the faces of the best lawyers in America, his rashness became laughable. Even though he had the resources of his party in the House to draw upon, including Nicholson and Rodney, both fair lawyers, yet at the bar before him he had not only Judge Chase, keen, vigorous, with long experience and ample learning, but also, at Chase's side, counsel such as neither Senate nor House could command, at whose head, most formidable of American advocates, was the rollicking, witty, audacious Attorney General of Maryland; boon companion of Chase and the whole bar; drunken, generous, slovenly, grand, bull-dog of federalism, as Mr. Jefferson called him; shouting with a school boy's fun at the idea of tearing Randolph's indictments to pieces and teaching the Virginian democrats some law, the notorious reprobate genius, Luther Martin."

The very sight of this array of talent and forensic power brought dismay to the heart of Randolph. At the very beginning of the trial he was forced to abandon his theory of impeachment and to accept the challenge that a conviction could be claimed only when the accused was shown to be guilty of an indictable offense.

When Randolph made this concession he found he had placed himself in an arena where the rules of combat were the rules of law applicable in the ordinary courts and where his antagonists were lawyers, trained in every rule of practice. As the leader of the board of managers, the Virginian planter, without a lawyer's education or training, without practice and without knowledge of law must measure strength in a legal battle with Luther Martin, the foremost advocate of America. We can imagine his discomfiture, and when we remember that Aaron Burr, himself no inferior lawyer, presid-

ed at the trial, that the Associate Justices of the Supreme Court were present and that Chief Justice John Marshall, keenly alive to the motives of the prosecutors, looked on while Randolph raged, stumbled, halted, and blundered, the spectacle presented is one that excites pity - pity for the weakness of the combatant even though his cause was unjust. It need not be said that Justice Chase was acquitted. The federal Judiciary was saved from the premeditated assault of the strict constructionists, and at this failure the Jeffersonian party broke into factions and lost its power and discipline, while Chief Justice Marshall continued his splendid services in interpreting the federal constitution in a manner not pleasing to the administration, but in a manner that gave strength and power to our government and that brought honor to the name of John Marshall.

The trial and its results established and settled the independence of the federal Judiciary, and placed it beyond the reach of a captious Congress.

The attempt to use the impeaching power for the purpose of enabling Congress to control the Supreme Court and to make Justices removable from office for "offensive partisanship" was an outrage that the popular sense of justice could not approve, and along with the condemnation of the use thus attempted to be made came distrust and lack of confidence in the remedies offered by the law.

If one cares to examine closely the trials in the various State Courts it will be found that an impeachment is seldom made in good faith, but is usually the outgrowth of political strife, and charges are made for the purpose of removing and destroying some offending official whose chief fault may be his inability to keep the friendship of his accusers.

The fact that a conviction on impeachment may be had only when the offense charged is indictable, and that the rules applicable to trials are the same as in the ordinary Courts argues against the necessity for maintaining the impeaching power.

The weakness of Senates shown by a comparison with the judges of our ordinary Courts argues against the efficiency of Impeachment Courts.

The fact that decisions are always given under the influence of partisan prejudice and that motives other than a desire to purify public service lie beneath the charges, argues that the impeaching power is dangerous.

## **A People-Made Constitution.**

BY HENRY MULEAN.

The subject of a new constitution for the State of Kansas seems to be a never-ending theme. At each recurring session of the Bar Association for many years, it has, I believe, been up for discussion, and resolutions recommending it have been adopted, but, like most of the recommendations of this body it has been a mere "waste of sweetness on the desert air."

That we need a new constitution is almost universally admitted. However, many who recognize this need do not favor a constitutional convention. The discussion of this question, both in this body and elsewhere, has been directed almost wholly to the reasons why a new constitution should be adopted. There has been next to no consideration of the method by which a new constitution should be constructed. It is to this branch of the subject, how a new constitution for the State of Kansas should be made, that I wish to direct your attention.

Our government is founded upon the theory that it is self government by the people; but our system of delegated powers, with its attendant caucuses, and conventions, and election contests results in mere government by party "bosses." Self government is, indeed, but an ideal, toward which all modern governments are tending. As yet, it is not a reality in any country. The little republic of Switzerland, is, however, nearer the goal of democratic perfection than any other nation.

The main reason why we do not have a full and comprehensive system of self government in this country is because a large body of our people are not yet believers in self government; or, if they do believe in it, their interests

are opposed to its realization. The commercial classes, and the professional men, and the politicians—who are too often commercial men in the most commercial sense of that term—do not, as a rule, believe in the ability of the American people to govern themselves.

The truth is, that, during the century that is just closing, the best thought, and the best effort of men in this country have not been applied to politics and statecraft. They have been applied to commerce and invention. The material development of this continent was seriously delayed until the establishment of this government, and the adoption of the present constitution; and then, when its marvelous resources became available, it offered such magnificent prizes to venturesome commerce that the importance, the glory, and the humanitarian considerations of governmental duty were forgotten. Again, at the very time when this government was just started, the principles of the inductive philosophy, as systematized by Bacon, were so far assimilated by the people, that, out of their study and development, were ripening the fruits of physical science—our modern inventions. The fascination of the study of physical science, and the material rewards of our system of patent monopolies, attracted another large body of mental workers. In competition with commerce and invention the fields of statesmanship during this century have been but poorly worked. The laborers have too often been but the scum of the commercial classes.

So thoroughly have our people become imbued with the progressive spirit of commerce and invention that they have learned to welcome almost every innovation and new achievement in those fields, as a blessing. There no conservatism exists. The most radical and stupendous changes in commerce and invention take place without creating either fear or astonishment among the people. Edison's new invention by which he promises to revolutionize the whole iron industry of the world, creates but a word of comment in passing. If any observation at all is made, it is to the effect that this is but another turn in the evolution of applied science. A few days ago the newspapers announced that the great department stores are demanding a reduction in the rates of advertising, and that the department stores throughout the country are forming a gigantic trust to control the entire retail trade of the republic. If any comment is made by the people upon that, it is to the effect that it is but another turn in the evolution of commerce.

We have opened our eyes to the blessings of change and progress in commerce and invention, but, when we come to look into matters of government and jurisprudence except government by injunction we adjust the glasses of conservatism to our eyes, and we scrutinize each proposed change with fear and trembling lest it be an infernal machine, invented by some disordered brain for the purpose of destroying some sacred prerogative of capital.

The public mind is, however, awakening to matters of governmental change; it is beginning to realize that government, no less than commerce, no less than science, no less than invention, no less than religion, and no less

than society itself, is governed by, and develops according to the great, universal law of evolution.

If we have not yet constructed a form of government for this republic which gives us self government, it is because the development of republican institutions here is still incomplete. Imperfect and incomplete as republican government now is, the epic of the centuries is the evolution of democratic institutions. It was the ideal of democracy that leveled the institutions of the feudal system; it was the ideal of democracy that wrested sovereignty from the Church and gave it over, a sacred trust, into the hands of the State; it is the ideal of democracy, with its myriad of workers, that is leveling the monarchical castles and turrets of European governments, and is transforming them into parliament houses and senate chambers; it is the ideal of democracy, that, in America today, is raising up its commanding voice against existing conditions, and is demanding a humanitarian government based upon the cardinal teachings of the lowly Carpenter of Nazareth.

The pessimist deplores the decay of loyalty to democratic institutions and ideals in this country; but he is in error. The fact is that democratic thought in this country at this time is far beyond that of the revolutionary period. That this may be the more apparent let me briefly review the thought of those days and compare it with that of these times. At the close of the Revolutionary war democratic ideas had not progressed very far. That war was fought for one democratic principle only the right of self taxation. A general scheme of democratic government had not then become popular; but democratic ideas had progressed so far that it soon became apparent that the new American government would be some form of a republic. No sooner was the new government set up, and especially no sooner did the weaknesses of the Articles of Confederation begin to manifest themselves, than the politicians and statesmen of that day began offering plans for a new government. The dividing line then was the same as now. Those who believed that the people should be permitted to govern themselves formed one class the democrats; those who believed that the people should be governed, formed the other the aristocrats. The leaders of the first class were Thomas Jefferson and Patrick Henry; those of the other were Alexander Hamilton and John Adams. At last, after a prolonged and earnest contest upon the platform, in the press, in conventions, and in State and National Legislatures these contending forces met in the convention which framed our present federal constitution.

Hamilton was no demagogue. If devotion to political institutions and principles which one honestly believes to be the best for the people is patriotism, then Hamilton was no less a patriot than Jefferson. The contest was not a contest between men, it was a contest of ideas.

Hamilton had no faith in popular government. "From the day in 1780 when he wrote from Washington's camp the letter to Duane, setting forth the scheme of a stronger government, he never ceased to labor for that end, In every legislative body within his reach he had striven for resolutions com-

mending that object. \* \* \* \* He had labored incessantly to form public opinion by essays in newspapers, by addresses and speeches, while in private letters he kept up a constant communication with those leaders who thought as he did and sought always to make converts where his words and his friendship could have weight." He gave all his energy to building up a sentiment that would end in the establishment of a government, democratic in name, but based upon an aristocracy of wealth instead of upon a democracy of men - a government which would have in it as little of democratic principles as possible. He boldly asserted that the British government was the "best model in existence."

At last the critical hour had come. The delegates were assembled to frame the new government. New York sent three. They were Chief Justice Yates, John Lansing, Jr., and Alexander Hamilton. Yates and Lansing stood uncompromisingly for a government based upon democratic principles. Hamilton was the head and front of those who favored an aristocratic republic. As the vote was taken by states, and, as Hamilton's state cast its vote steadfastly against his views, his influence was greatly weakened, but that does not mean that his influence was not powerful in the convention. As a logician and a debater Hamilton has never had an equal in America. He was always master of himself, and always master of all his faculties. He seized the first favorable opportunity to impress his views upon the convention. His object was to turn the minds of the wavering and uncertain from a constitution based upon democratic principles to one based upon aristocratic principles. In a speech, six hours long, he held the attention of the convention in an exposition of his favorite scheme of government. Into that speech he concentrated the thought, and study, and reflection, and investigation, and learning of years. It was a speech of exceptional force, logic and learning, and its effect was far-reaching. It has determined the fate of thousands under our present constitution. When its influence will end can be told only by telling when the present federal constitution shall be rewritten upon more correct principles of self government.

In the language of his biographer, Senator Lodge of Massachusetts:

"The republic of Hamilton was to be an aristocratic as distinguished from a democratic republic, and the power of the separate states was to be effectually crippled. The first object was attained by committing the choice of the President and Senators who were to hold office during good behavior, to a class of the community qualified to vote by the possession of a certain amount of real property. The second was secured by giving to the President of the United States the appointment of the governors of the various states, who were to have a veto on all state legislation."

Democratic principles had progressed too far for the ideas of Hamilton to be adopted by the convention. However, the constitution that was adopted gives to the people a very small part in the federal government. It does not give them the power to elect the President, it delegates that to the electoral college; it does not give to them the right to elect United States senators, it delegates that to the state legislatures; it does not give them power to name federal judges, it delegates that power to the President of the United States.

It gives them no power to recall a representative, a senator, a president or a judge. It gives them no power to propose laws, or to veto laws passed by the national legislature. It gives to the people directly only one small power, that of electing members of the lower house of congress. That convention made it impossible to amend the constitution except by revolution. And this was styled, "Self government by the people."

Hamilton's distrust of the people has been the prevailing sentiment of our politicians and statesmen from the foundation of the government to the present time. Out of our long list of presidents we have had but two who were thoroughly imbued with the spirit of democratic government; but two who had an abiding faith in the correctness of untrammelled public opinion; but two, who, when worn and distressed, and uncertain as to what course to pursue in great questions of state, looked out upon the great ocean of humanity for inspiration and guidance. They were Thomas Jefferson and Abraham Lincoln. The motto of the first was: "Trust the people"; the central thought in all the public life of the latter was: "A government of the people, for the people, and by the people." In future times, when democratic principles shall have triumphed, and the rule of the people has been established, and the history of this republic in the nineteenth century shall have been written, these two names will stand most exalted.

We are separated from those revolutionary times by more than a century. Our advance in thought, at least, along democratic lines is most marked. The true democratic spirit has developed until we find our entire nation a seething, boiling caldron of agitation. The people are demanding changes in our institutions, that they may the more perfectly conform to the democratic ideal. The democratic ideal is, not only in this country, but in Germany, France, England, and even in Russia, proclaiming that it will soon occupy the fields of industry, as well as those we now style politics and religion. The change of thought upon this subject in Kansas has been overwhelming. Here the evolution of democratic principles has so far advanced that the people are no longer willing to delegate more power, or to delegate new powers to representative bodies. During the last decade the people of this commonwealth have studied politics, and political methods, and political institutions probably more thoroughly than any other body of people ever did. Here the farmers, the railroad men, the miners, a large body of the commercial men, and an occasional member of the learned professions, believe that the people of Kansas are capable of self-government in the full sense of that term. They have lost faith in our lobby-beset legislative bodies; they demand direct legislation.

The legislature of 1897, although it was perhaps the most efficient, and perhaps the least corrupt of any legislature that has assembled in the state since before the York-Pomeroy episode, and, although among its members were some of as loyal and true men as were ever elected to office, wholly failed, as its predecessors had done, to give satisfaction to the people.

Enough members of that legislature so far forgot the radical demands of their constituencies, and became so extremely conservative, that the legislature, as a whole, gave far greater satisfaction to the party which opposed it than it did to the party which elected it. The greatest service which the last legislature rendered the people of the State, is, that it showed them beyond question that representative government is not democratic government. To this great benefit the most venal, as well as the most conservative members contributed most. If the last legislature failed ignominiously in putting in to execution, to any considerable degree, the cardinal tenets of the party which elected it, what may the people expect from a constitutional convention made up of the same class of men?

The repeated and fruitless efforts to secure a constitutional convention, and to secure alterations in the constitution by amendment, ought to teach the politicians that the people of Kansas have decided to abandon delegated government, and to take the reins of power into their own hands. They will not grant to the politicians a constitutional convention. Neither will they accept a politician-made constitution. It is surprising that we find preserved in our present constitution the recognition of the sacred right of the people to have amendments referred to them before their adoption. This, more than any other feature of our state government, is a recognition of the basic principles of democratic institutions. Governments are best made by evolution. Our present constitution has checks and hindrances which not only impede the smooth and natural development of our institutions, but they amount to positive obstructions to any development at all. It repudiates the fundamental principles of self government by the people; and it substitutes the most vicious form of minority rule for the republican principle of majority rule.

Section 1 of article 14 of the present constitution provides the method by which the constitution may be changed or amended. It reads:

"Propositions for the amendment of this constitution may be made by either branch of the legislature; and if two-thirds of all the members elected to each house shall concur therein, such proposed amendments, together with the yeas and nays, shall be entered on the journal; and the Secretary of State shall cause the same to be published in at least one newspaper in each county of the state where a newspaper is published, for three months preceeding the next election of representatives, at which time the same shall be submitted to the electors for their approval or rejection."

There are three main objections to this method of amending the constitution. The first and most vital is that the cardinal principle of self government by the people is denied. While the people are permitted to accept or reject amendments proposed by others, they have no power to propose changes themselves. Their tongues are speechless. They must use their only spokesman a lobby-hounded legislature. Not content with depriving the people of the right to propose changes in the constitution the present method does not even permit a two-thirds majority of the members elected to the legislature to propose amendments, but it requires a two-thirds ma-



majority of each house to favor the submission of the amendment before it can go to the people for acceptance or rejection. Such a vicious establishment of minority rule would have delighted the very soul of Hamilton in his efforts to set up an aristocratic republic. It is exactly such provisions as these that caused Andrew Carnegie in his book entitled "Triumphant Democracy" to recommend to the British people the adoption of such a constitution as we have in America as best affording protection to the ruling aristocratic classes of that empire. The third objection to the present method of amending the constitution is, it is inordinately expensive. As it now stands each proposed amendment must be published for one-fourth a year in at least one newspaper in each of the more than one hundred counties of the state. The cost of printing incident to the submission of the last proposed amendment was \$10,721.85. No special care seems to have been taken to secure any material reduction of this expense. These difficulties and objections have hitherto proven so insurmountable that the matter of amending the constitution has been about abandoned. Attention has been directed almost wholly to securing a constitutional convention.

If we are right in our theory of government, that is, that ours is "a government of the people, for the people, and by the people," then let us "trust the people," and adopt forms of government that will give to the people the powers of government. If our theory is right, that the majority should rule, let us hasten to make our institutions conform to the true theory. The suppression of the voice and rule of the people either by constitutional prohibitions, or by debauching their legislatures and elections is an open invitation to revolution.

It is to be hoped that we, in Kansas, are about ready to make our state government in fact what it is in theory, self government by the people. This can be done by so amending the constitution that the desired changes may be proposed by the people themselves. What is wanted is a people-made rather than a politician-made constitution. Section 1 of article 14 of the constitution should be so amended as to incorporate into it the principles of self government and majority rule, and the expensive feature should be eliminated. Whenever a reasonable number of the people of the state desire that a proposed amendment should be submitted for the consideration of the people that right should be secured by petition. Whenever a majority of the members of the state legislature desire that a proposed change in the fundamental law be made, they should have the right to cause it to be submitted to the consideration of the people.

The state should take advantage of the inventions and improvements in printing, and should own and operate its own printing plant. It should publish periodically a State Bulletin which should contain all legal publications of a state character, and in which should appear the reports of the various state officers and the proceedings of the state legislature, and in which, would, of course, appear the proposed amendments. This Bulletin should be furnished to the people at cost.

If the next legislature will cut down the cost of printing to one-third or one-fourth what it now is, and will submit some such amendment as the following, it will probably be ratified by the people:

*Resolved, By the Legislature of the State of Kansas, two thirds of the members of each house concurring therein:*

That section 1 of article 14 of the constitution of the State of Kansas shall be amended so as to read as follows:

"Section 1. Whenever one-third of the legally qualified electors of the State of Kansas who shall have voted therein at the last general election for state officers shall propose by petition any change in or amendment to the constitution of the State of Kansas; or, whenever a majority of the members of the state legislature shall, in joint session, propose by resolution or otherwise any change in, or amendment to the said constitution, it shall be the duty of the secretary of state to cause such change or amendment to be submitted at the next general election for state officers, to the legally qualified electors of the state for their acceptance or rejection. The correctness of the petitions shall be verified, and the notice of the submission of the proposed change or amendment shall be made as shall be provided by law."

Such an amendment ought to receive the hearty support of every individual and every organization in the state whose efforts are devoted to any kind of reform requiring legislation. For such an amendment the advocates of the initiative and referendum, the advocates of equal suffrage, the advocates of the single tax, and those favoring the resubmission of the prohibitory amendment ought to work in unison. For such an amendment every believer in free institutions and self government by the people ought to labor. If submitted by the next legislature such an amendment will probably carry by an overwhelming majority. Its adoption would mark an epoch in the evolution of democratic government. I am not unmindful of the consequences of such a change in our institutions. It would indeed, be great; its results in the end would be good.

It is here, in the valley of the Mississippi that the future great achievements of the human race are to be wrought out; here will be witnessed the evolution of science, of art, of literature, of invention, of commerce, and here will be witnessed the evolution of democratic government. The people of Kansas, by intelligence, by learning, by a study of political principles and political history, by character, and by courage are qualified to take this step. Let them demand the right to re-make their constitution, and to re-make it in their own way. It may be declared an axiom that any people will have a government as free and as perfect as they have intelligence to invent and courage to demand. Let us have a new constitution, but let it be people-made.

## **A Study in the English Constitution.**

BY LUCIUS H. PERKINS.

It was a wise saying of a great teacher of philosophy in my college days, who, when we complained that we could not understand Carlyle, in his great prose poem, was wont to say: "Young men, do you know the French Revolution? If not, how do you hope to understand Carlyle?"

No man who is not a student of history will ever understand the spirit of a constitution.

No man who conceives that history is the story of kings and ministers and intrigues and conquests in war and peace, or even the rise and fall of empires, will ever understand the spirit of a constitution.

He who would interpret a constitution must first know history and then become imbued with the philosophy of history. The roots of the present are buried so deeply in the past that to comprehend the fruit one must know the food it fed on.

We are joint heirs of all that has been. It and we compose The Now.

What a marvelous inheritance is the accumulated wisdom of the ages! And what great luck not to have been born too soon!

Facts, events, the things that came to pass are the warp, causation in the woof of history.

Constitutions are the residuum of experience. They should represent the combined wisdom of all the people past and present. They flow from the people to the people. They are the aggregate voice of the people.

We are so prone to think of a constitution as a sacred writing, numerously signed, formally adopted, fixed in form, firm in foundation and unchangeable

as the everlasting hills, that we are at first lost when we approach the English Constitution.

We have grown used to the unwritten common law, but an unwritten constitution presents obstacles, numerous, weighty, well-nigh insurmountable to a foreigner.

How shall we come at it? Where shall we find it? How shall we recognize it? What manner of thing is this gradual growth of fourteen hundred years, which men call the English Constitution?

As there were men before there were manners, so there were manners before there were human laws.

Constitution is the name of the ultimate or fundamental law to which all other laws must conform. Hence the roots of the constitution of a primitive people must be sought in the primitive manners and customs of that people.

Old England is not the fatherland of Englishmen. The ancient Briton, savage or Romanized, concerns us little in the study of the English Constitution.

As the Indian retreated before the Pilgrim Fathers, so did the ancient Briton give over his birth-right to the conqueror, and Angleland became his henceforth no more forever.

(One of the most remarkable migrations in history was the movement of the Angles from the peninsula of Schleswig, where authentic history first finds them, to the island of Briton. They moved with their wives and children, their tangible belongings, and their household gods, their manners, their customs and their laws, and left a desert behind them.

Standing on the cliffs at Ramsgate, the eastern-most extremity of England, looking over the German Ocean toward the rising sun, we may, in fancy, see the coming of Hengist and Horsa and their landing at Ebbsfleet, and witness the dawn of English History in merry England in the year of grace 449.

This is holy ground which first felt the thrill of the tread of Englishmen. Pirates and roving adventurers! do you say? Heathen worshippers of Woden and Thor! Subverters of Christianity and a higher civilization than their own! Merciless butchers, who devastated the land with fire and sword and refused all quarter to the race they dispossessed!

Yes, all this and more.

In their conquest of extermination our fierce forefathers swept away the language, the literature, religion, customs and laws of Briton and Roman and transplanted in that plundered soil their own. But from the ashes of this ruin sprang a nobler type of manhood than that which perished in the flame.

Following the Angles came their kindred the Saxons, from the same German shore, with Cerdic at their head, who gave to the new Anglo-Saxon England its first dynasty of kings.

And so it will be in the manners and customs of the primitive Angles and Saxons that we shall find the first rudiments of the English Constitution.

(On an occasion such as this when the greatest of all the graces is brevity,

you would beg to give me leave to print if I presumed even to open up so charming a theme as the early manners and customs, religion and laws of the primitive Angles and Saxons in their Fatherland, and in Old England before the Norman Conquest.

It must content me for the most part to refer you to the Angli dwelling upon the Lower Elb as Tacitus describes them eighteen hundred years ago, and the Saxons in Holstein as found by Ptolemy A. D. 120, and to the Salic Law; the *Lex Angliorum* and the *Lex Saxonum*.

The ancient Angles and Saxons had no kings, and it is curious that kingship among them was the product of conquest on British soil.

Cæsar describes the German tribes as having no central magistracy but a common council for each tribe.

Tacitus says in the *Germania* that a few of the tribes were monarchical, but most of them had no kings. They chose their leaders and maintained a *civitas* or state, the general assembly of which was a gathering of the *hostes*, open to all the freemen of the tribe. There were classes, *nobiles*, *ingenui*, *liberti* and *servi*, and ranks among the nobles, *principes*, *duces* and *sacerdotes*.

In the century and a half from Cæsar to Tacitus we seem to see the end of nomadic life, and the beginnings of vested individual property in land.

The several Germanic tribes were bound together by kinship, similarity of race, tongue, religion and manners, which were preserved and propagated by imitation not by authority.

From what we know of the progress of barbarous races it is easy to believe that during the two centuries after Tacitus when we practically lose sight of the Angles and Saxons their progress in civilization was slow.

Such as it was, they brought their civilization with them, in the fifth century, to Britain. There were then the nobles, the freemen and the slaves. Their simplest political division, the *vicus*, was the township, which is the modern English parish. The *pagus* or hundred was presided over by the bishop or earl.

There were traces of the Mark system. There was always the right of election of all chiefs and leaders. There was the Frank Pledge, and the enforced dependence of every man on some great noble, whereby the eorl became the eorl's man, and, though a freeman practically bound to the soil.

The new conditions brought great changes. New strifes brought new emergencies. The step from ealderman to king would follow easily after some great victory. It was a habit of the kings of old time to fancy they were descended from the gods; hence we presently find the house of Cerdic the lineal descendants of Woden.

A heptarchy of petty princes is not a State, but when they become merged into one united kingdom there comes the consciousness of individual nationality, and their manners and customs are the fundamental law of the land, and when recognized as such, they are the constitution, without any writing or signing or enactment and even without any legislature.

The great council or general assembly of the wise men, called the Witenagemote, was the fountain of all power. It made and unmade kings. It was the Court of last resort. It made the laws. It levied the taxes. It freely counseled the king in peace and war. It consisted of the great landed nobility, the arch-bishops, bishops, abbots, priors and knights; but the commons had no voice in the Anglo-Saxon Witenagemote.

It was pre-eminently a government of the aristocracy to which the great men of the realm were summoned by the king, and attended in person, in their own behalf.

Not until two hundred years after the Norman Conquest is there anything approaching representation.

The story of the Norman Conquest, with all its lessons and modifications of existing institutions is one of the richest mines in the history of civilization.

It is not worth while to encumber one's head with many dates, but a few are worth remembering. Among them is 1066.

With the fall of the Saxon monarchy came the powerful personality of the Conqueror, and the Normans, with their pride, their arrogance, their contempt for the Saxons and for all laborers and craftsmen; but also with their courage, their intellectual and physical vigor, their statecraft, and their broader civilization.

There was no such difference between Norman and Saxon as between Saxon and Briton. They were from kindred stock, and above all they had adopted a common religion. Five hundred years before the Conqueror, St. Augustine had landed at Ebbsfleet on the very spot where, a century and a half before Hengist and Horsa first set foot. This little village in the Isle of Thanet should be held more in honor than any spot in England, for it welcomed the race to its new fatherland, from whence it has replenished the earth; and it welcomed the standard of the Savior of mankind.

The assimilation of the races was slow, but it saxonized the Norman, instead of normanizing the Saxon.

The modification was great but the result was immense growth in individual and national character. The greatest modification of Saxon institutions was the complete adoption of the Feudal System.

Before the Conquest feudalism had taken hold in England but it had never rested with so heavy a burden as on the Continent.

There was every reason why William should desire the most rigorous establishment of the system in England. His whole life and training were imbued with it. No one knew better its centralizing power. He knew the greed of his barons and how to satisfy it.

Feudalism permeated all ranks, first binding the barons to the king, then binding their dependants to the barons, but it rested heaviest on the common people. The villeins or serfs were in abject slavery and their only friend was the common law, which, with many beneficent provisions slowly

ameliorated their condition, and finally wrought their emancipation.

We have, then, at this period of the evolution of Anglo-Saxon institutions, the powerful influence of Norman feudalism, a highly centralized monarchy, looking hard towards absolute despotism; with vast wealth and untold patronage in the crown; and the residue of power vested in a baronage largely created by the crown; but the people were servants or slaves, and did well to keep a whole skin, without meddling in affairs of state.

Such vast power has at times been wisely used by a great king, but it is not transmissible. His descendants will abuse it and become tyrants.

England escaped from bondage through the weakness of her kings. English liberties fattened on the foibles of the unworthy descendants of the Conqueror. While Richard of the Lion Heart was listing a phantasmagoria in the Holy Land, the shackles were falling from the great commonalty of England, and the barons were learning less obsequious subservience to the crown, and more consideration for their dependants who were their strength in arms in a conflict with the king.

John was a special dispensation of providence, and the weakest and wickedest of kings became the mightiest instrument for the upbuilding of English constitutional liberty.

On a balmy day in the month of June, 1891, a pair of travelers on pleasure bent, might have been seen boarding a London and Southwestern Railway train at Clapham Junction and alighting at the picturesque old town of Staines, about five miles from Windsor Castle and near the eastern boundary of the Windsor Great Park. Across the Thames to the northwestward and on the south side of the river lies an open grassy meadow, stretching some two miles along the river. There is not on earth a more peaceful bit of pastoral landscape, nor one so big with the story of English liberties.

This is the plain of Runnymede.

Here on one other day in June, six centuries gone by, the barons of England extorted from their baffled tyrant the Great Charter of liberties, which is our common heritage.

The travelers look in vain for some memento, some lettered monument, some cairn or stone to mark the birthplace and the shrine of English liberties.

Across the Thames is Ankerwycke where stands the hoary yew tree, now more than thirty feet in girth, where fat old Harry VIII first danced upon the green, then wooed and won fair Ann Boleyn.

Midway is the rustic islet where John's determined barons made their stand after the final parley in the plain of Runnymede, and where the tyrant met his masters face to face, and where was signed and sealed the greatest writing since that which Moses fetched down from Mount Sinai.

A building said to have been built to commemorate the great event still stands on Magna Charta Island, and the table on which the Charter was signed is still preserved.

If we were politicians instead of lawyers, I should, perforce, be intensely

American, and hold up all things English to ridicule, and try to assist the American Eagle to unjoint the tail of the British lion.

But on your undertaking not to betray me at the hustings, and in this intellectual privacy, and among men who recognize that the fountains of our jurisprudence lie deep down in the English common law, I may venture to touch up the other side of the British aristocracy, and remind you that to the Barons of England, whose lineal descendants now compose the House of Peers, we are indebted for Magna Charta, and all the blessings of liberty that have flowed from it as from a mighty river, swelling ever as it flows, gladdening the hearts of men for six hundred years gone by, and bearing its pledges for the future into all lands where the English tongue is spoken. So if, as Mr. Gladstone says, we have today "a sneaking kindness for a Lord" it is founded in gratitude for that which the downtrodden commons could not have achieved without the aid of the powerful Barons of England.

Magna Charta was not the first charter of rights granted by English kings, but it was the first, which, to use a modern figure in constitutional construction, was self-executory.

William granted a charter in 1071, but it was empty promises with no power outside of the throne to enforce it.

Henry I granted a charter and Stephen two of them and Henry II another, but, like that of the Conqueror, they had none of the elements of a contract; there was no remedy for their violation.

Guizot in his *History of Representative Government* luminously observes: "Liberties are nothing until they have become rights, formally recognized and consecrated. Rights even when recognized are nothing so long as they are not maintained by forces independent of them, in the limit of their rights.

"Convert liberties into rights, surround rights by guaranties, intrust the keeping of these guaranties to forces capable of maintaining them, such are the successive steps in the progress towards a free government.

"This progress was exactly realized in England. Liberties first converted themselves into rights; when rights were nearly recognized, guaranties were placed in the hands of regular powers. In this way a representative system of government was formed."

The charters of William and Henry I and Stephen and Henry II were violated with impunity, but the Barons formulated a plan whereby if the rights guaranteed by the Great Charter were violated they might lawfully levy war upon the king and seize his castles and lands until their grievances were redressed.

The charter provided that they should select twenty-five of their own number who were clothed with the joint powers of a vigilance committee to determine when the abuses existed, and umpires to decide when they were corrected.

They could not appeal to national sentiment or to the public conscience and obtain relief, so they reserved the right to appeal to arms; and to insure



the support of the commons, if for no higher motive, they conceded to their vassals the same immunities they extorted for themselves.

The immortal 29th Article makes no distinction of persons:

"No freeman shall be taken or imprisoned or be disseized of his freehold or liberties or free customs, or be outlawed or exiled or any otherwise destroyed; nor will we pass upon him nor condemn him, but by lawful judgment of his peers or by the law of the land."

And the 40th Article is worthy of the Decalogue:

"We will sell to no man, we will not delay or defer to any man either right or justice."

The Great Charter as signed June 19, 1215, contained sixty-three Articles, but most of them related to the exigencies of that time and are of no special value now except to the student of constitutional history.

In this age of the absolute supremacy and preponderance of the law, when we are ruled by the law alone, and as Professor Dicey well says: "A man may be punished for a breach of law, but he can be punished for nothing else," it is hard to imagine a resort to civil war to redress grievances, but it was an effectual guarantee adapted to that rude civilization.

We cannot stop here to consider the revocations, re-enactments, modifications and confirmations of the Great Charter; neither can we take up in detail the circumstances that produced the Petition of Right or the Bill of Rights, but these three, to borrow an apt phrase from Lord Chatham, may be called "The Bible of the English Constitution." The simile is opposite because they are the principal written part of the constitution.

The general fabric of the constitution resembles in its expansiveness, the common law.

In its cardinal principles the English Constitution requires a government by an hereditary, limited monarchy, and a representative parliament, summoned of the whole realm, consisting of the peers and the elective representatives of the commons.

The king in parliament, consisting of the lords spiritual and temporal and the commons, comprise the government, and the fountain of all power.

Without the sanction of parliament no law can be made or changed and no tax imposed.

The first recognition of the lords and commons, was the great assembly at Salisbury in 1070, where all the land owners of England became the men of the Conqueror.

The rights of the hereditary peers are founded in the right there conceded to be summoned to every great assembly, and participate in the councils of state. But the birth of the House of Commons was two hundred years later when the rebel, Earl Simon de Montfort, overthrew his brother-in-law, Henry III, and summoned an assembly which met in London, January 30, 1265. This assembly formed the basis for the modern English Parliament.

In the reign of the Third Edward parliament began to assume its present

form and constitution, and about the year 1377 we find the first mention of the Speaker of the House of Commons.

It was then in fact what it is now only in name, the Lower House.

But the power of the Commons grew apace. Their right to grant taxes easily grew into a right to initiate all money bills and supplies; and the stoppage of supplies became the most powerful engine for the redress of grievances.

In natural sequence of their right to participate in all legislation, came the right of liberty of speech and immunity from arrest. Then followed the recognition of their right of impeachment of all great officers and ministers of the crown. This marks an epoch in the development of the English Constitution.

The impeachment of the royal favorite Michael de la Pole, Earl of Suffolk, in 1386 was a great victory over Richard II. It was a mighty acquisition of power, and a precedent which was freely followed then, but rarely exercised in modern times.

The exclusive power of impeachment resides in the Commons; the power to try impeachments in the House of Lords. This is the highest criminal jurisdiction under the English Constitution.

For the student of political philosophy there is no more profitable study than the growth and development of the English Parliament during the last five hundred years.

Formerly it was the province of parliament to petition the King; but now that parliament is the real sovereign and all moving power for the public weal flows from the "King in parliament," all petitions are addressed to parliament.

The term, "The King in parliament" implies that the reigning monarch is one of the component parts of parliament, in its broadest acceptation, and is necessary to complete the sovereign governing power of the realm.

As at present constituted, Parliament is divided into two Houses; the Lords and the Commons.

They are housed in the imposing New Palace of Westminster, with its frontage of nearly a thousand feet upon the Thames; built in the late Gothic or Perpendicular style, at a cost of more than fifteen million dollars; said to contain eleven hundred apartments; and altogether bewildering in its magnificence.

The Upper House, so-called, consists of the Peers, who sit by hereditary right, or by creation by the sovereign, or by virtue of office, as the English bishops, or by election for life, as the Irish peers, or by election for each parliament, as the Scotch peers.

They number about five hundred and fifty. They represent the landed aristocracy. They are possessed of vast inherited wealth, which most of them do not increase by use.

Among the hereditary peers are many of the most ordinary intelligence,

who, if stripped of their rank and wealth would be nowhere in the survival of the fittest.

They have always possessed and will always possess a few of the greatest scholars, the brightest lawyers, the wisest judges, and the broadest and safest statesmen of the nation.

They excel in conservatism. They are not, as a body, eager politicians. They are, as a body, inclined to be apathetic.

No hereditary chamber can be of a high average ability. The eldest son, however stupid, inherits the peerage. The youngest son of the same family may become the leader of the House of Commons. The one will continue to be an ass by divine right. The other a marked man among men, by his own merit.

Nevertheless, let no man, who does not know, condemn the House of Lords. Its conservatism is the best balance-wheel in the English Constitution.

It is a House of revision, not of veto. In any struggle with the Commons, where the latter are backed by public sentiment, the Lords must finally yield.

It has no such dead-lock power as our senate. If the country demands a measure and the Commons pass it and send it up, the Lords may send it back once, twice, thrice; meantime public sentiment crystalizes; the first white heat cools off; a few months of discussion clears the atmosphere. But if the people still demand it the Lords must bend to the Constitution and the will of the people prevails.

Let no man be too fast to say that this is worse than our own scheme of legislation. It works well. It is none the worse because it is not new.

The Lower House, so-called, consists of the knights of the shire, or representatives of counties; citizens, or representatives of cities; and burgesses, or representatives of burroughs.

They number six hundred and seventy.

No English or Scottish peer can be a member of the House of Commons. Neither can a clergyman of the Church of England, nor a minister of the Church of Scotland, nor a Catholic priest. Certain government officials are also excluded, but with few exceptions any male subject of Her Majesty, resident in Great Britain and twenty-one years old may "stand" for parliament.

If the Lords maintain the dignity of the nation, the Commons do the business.

Momentous duties, besides, legislation, devolve upon the House of Commons. It elects the Prime Minister, who is for all intents and purposes the President of the nation. There is no officer in our government, except the President, who approaches the English Premier in power.

He has no tenure of office except the *confidence*, which means the will, of the House of Commons.

The Prime Minister selects the Cabinet, which stands and falls with him. The Cabinet consists of:

The First Lord of the Treasury, who is generally Prime Minister.

The Lord High Chancellor.

The President of the Council.

The Chancellor of the Exchequer.

The Secretary of State for the Home Department

The Secretary of State for War.

The Secretary of State for Foreign Affairs.

The Secretary of State for the Colonies.

The Secretary of State for India.

The First Lord of the Admiralty.

The Lord Chancellor of Ireland.

The Chief Secretary of the Lord Lieutenant of Ireland.

The Chancellor of the Duchy of Lancaster.

The President of the Board of Trade.

The Lord Privy Seal.

The President of the Local Government Board.

The President of the Board of Agriculture.

Seventeen in all and through them the Prime Minister dispenses the mighty patronage of the United Kingdom.

While a resident of London for nearly three years I made it a duty, whenever possible, to read every day the greatest of all newspapers, The London Times, and kept a file of it for reference. It was almost equivalent to a college education, both in work and in profit. It taught me, among other things, some of the great uses and functions of the House of Commons.

Besides making the laws and electing the Premier, it is the great training school for public opinion.

The Lord Chancellor is the keeper of the King's conscience, but the House of Commons is the keeper of the Nation's conscience.

It is the trying place for grievances. The debates in the House fill the press, and the great morning dailies put the best brains the Queen's coin can buy into their editorial and critical reviews of the proceedings of the House of Commons. Thus it becomes, through the publicity of the press, the greatest of all public educators.

The Englishman, who is not quick of perception, is powerfully tenacious of a habit once acquired. His morning bath is not more indispensable than an accurate knowledge of all that was said and done yesterday in the House of Commons.

Through the medium of petition almost anything can be brought before the House. This of course includes much that is good and a vast deal of rubbish.

The ministry alone can propose to tax the people.

Of course, in theory, the Sovereign is the ruler, and, in fact, is clothed with an immense amount of latent power, and with much real power, on the dignified and ornamental side of the government. The things the Queen might lawfully do, within the Constitution, would fill pages. But the things she really does are largely spectacular.

The Crown is "the fountain of honor," but the Prime Minister is the real executive of the nation.

This is a favorable point of comparison with the American Constitution. In England there is almost a complete blending of the executive and legislative departments.

The Prime Minister, elected by the House of Commons, selects his Cabinet from the Parliament. By a venerable fiction they are the Queen's Ministers. In point of fact the Ministry are the rulers; the real executive body. They are of Parliament; the creatures of it; yet they can destroy it and appeal to the country. But they must fetch up to the new Parliament a majority for the Ministry or the Ministry falls. According to the Constitution no Ministry can stand without the confidence of the House of Commons.

The Cabinet is a remarkable board of control; mum and mysterious in its proceedings. It has no Secretary and keeps no minutes; it meets behind closed doors. Even the newspaper man who has been everywhere, was never at a Cabinet meeting. No matter how much the members differ in secret, they are a unit in public. Their motto should be *E pluribus unum*. Seventeen hearts that beat as one.

The apparent advantage of the English Cabinet system of government is that there can be no dead-lock between the Executive and the Legislative. A vote of censure means that the Ministry must resign or prorogue Parliament and appeal to the country. Then the people say whether the Ministry is right or wrong. If the majority of the House of Commons is still against them they all go down together, and a new Prime Minister forms a new Cabinet.

Plainly there is more elasticity in a Cabinet than in a Presidential form of government; thus much may be predicated without affirming whether it is better or worse in practical efficiency.

The judiciary is the most independent department under the English Constitution.

All the Judiciary from the Justice of the peace to the Lord Chancellor are appointed, nominally, by the Crown. The Lord Chancellor and Chief Justice on the recommendation of the Prime Minister; all the rest on the recommendation of the Lord Chancellor.

The only political office in the Judiciary is that of Lord Chancellor, who has only civil jurisdiction. All the others hold for life or during good behavior, and are not removable by the Crown, except on the motion of both houses of Parliament.

The splendid apostrophe of Lord Brougham to the Judiciary should be taught to those who decry the courts, and remembered by those who exercise their high office.

He says: "Thus the judicial power, pure and unsullied, calmly exercised amidst the uproar of contending parties by men removed above all contamination of faction, all participation in either its fury or its delusions, held alike independent of the Crown, the Parliament and the multitude, and only to be shaken by the misconduct of those who wield it, forms a mighty zone which girds our social pyramid round about, connecting the loftier and nar-

rower, the humbler and the broader regions of the structure, binding the whole together, and repressing alike the encroachments and the petulance of any of its parts."

The modern Courts of England are all founded on the ancient judicature of the realm.

Above the petty courts the High Court of Justice corresponds with our District and Circuit Courts. The Queen's Bench Division of the High Court of Justice is the superior criminal court. Then comes the Court of Appeal; and finally the House of Lords, which is the Court of last resort.

By immemorial custom only the Law Lords participate in these legal proceedings of the House of Lords. Three or more, consisting of the Lord Chancellor, the Lords of Appeal in Ordinary, and the great lawyers who have held high judicial office constitute this Court of last resort.

The evolution of the English Constitution from the primitive polity of the Fatherland, through all the vicissitudes of the changeful years; through the mighty oft-times bloody, struggles of religious controversy; through the triumphal march of the Anglo-Saxon race, from the simple habits of a rude civilization, to the highest refinement of artificial society; is a subject so vast, so various in its differentiation, that to comprehend it in its entirety, one must know not only the facts of history and the characteristics of the race, but also the human heart, and the motives that impel men to action under a given environment.

The student of political philosophy, discovering our forefathers in a state of what Professor Freeman calls "Healthy barbarism," will find the keenest delight in tracing their growth from infancy to the highest type of manhood, and of statecraft, the world has yet produced.

Along with Creasy and Green and Guizot and Hallam and Bagehot and Taswell-Langmead and Bishop Stubbs, he will lay hold upon the moving force, the causation; and conceive a new notion of the fabric of society and how came to pass this aggregation that we call the State.

His richest reward will be in finding that institutions and laws and constitutions belong to the race, because they are evolved and sifted and purified not by a generation, but by all the generations of the race; and that today the science of government, in its highest type, is predicated on the evolution of Anglo-Saxon manners and customs.

The composition of the English race is an important factor in comprehending the Constitution.

The consanguinity of the Low German stock from which sprang the Angles and Saxons, with the Northmen, the Danes and the Normans, no doubt accounts for the marvelous blending of this composite race.

While each successive inroad of conquering force has modified the basic law, leaving it full of inconsistencies and imperfections and anomalies and apparent contradictions, yet they are for the most part self-correcting, and in very great part self-executory.

It will remain for America alone to demonstrate, not in one century nor in two, whether the English Constitution be not the ripest product of constitutional developement the mind of man has yet evolved.

It was not adapted to our environment. The halo that surrounds a king, and the filial homage accorded to the throne of an ancient monarchy, and the spectacular establishment that surrounds it, are wanting here. We could no more adopt it than a babe could adopt a father.

But it is, over all, adapted to the English race in England, and in spite of all inroads and changes and modifications it has steadily grown through forty generations, unique in its homogeneity, strong, elastic, beautiful, harmonious, and big with the all-sufficiency of its resources for the requirements of the nation for all time to come.

## The Law and the Agitator.

BY C. F. SPENCER.

It is the purpose of this paper to discuss this subject in the broadest and most comprehensive way, and especially not to deal with the law in a narrow and limited sense.

The laws existing at any time are supposed to represent as nearly as practicable, the best intelligence and highest conception of the people. These laws reflect the condition of the people and their varied institutions. In a multitude of ways, the law stands for that which is, for the existing order of things. Contending against that which is established, against the existing order of things as represented and reflected by the laws, we have with us always the *Agitator*.

These two forces, the Law and the Agitator, are the two great mill stones between which nations are ever grinding out the grist of progress. Like the mills of the gods they usually grind slowly, but the more slowly they grind, the more exceedingly fine is the product.

The law stands between the agitator and anarchy, and the agitator stands between the law and decay. Were it not for the law, the last vestige of order would be swept away in time; and were it not for the agitator, civilization would sicken and die.

It requires disturbances in our midst to clear the atmosphere, unmask injustice and elevate humanity.

But, while agitation is necessary to life and health, it may carry with it both disease and death to the body politic.



(On the surface of history it is easy to observe the beneficent changes wrought through the agitator; but, underneath this surface of history, and not so easy of discovery, we notice that government has ever been struggling to preserve its existence against excessive and intemperate agitation.

In one sense the whole problem of government may be resolved into the one proposition, whether between these two great mill stones, the law and the agitator, society can peacefully and successfully grind out its finished product from the great mass of raw material constantly on hand. (Or, stating it in a more popular way, the problem with us is, can the people through the lawful and constitutional methods provided by themselves, settle all the perplexing questions crowded upon their consideration. It is still the same question, centuries old, yet still and ever new, are the people capable of self-government? There are good and sufficient reasons why we as American citizens should quite frequently ask ourselves that question. It is true that we have had over a century of existence under our constitution. To us as American citizens this seems like a long time - long enough to give high promise of permanency. From this period of time we are in the habit of drawing much inspiration, especially on the Fourth day of July each year. But, when we take a view from an historical standpoint and contemplate the wrecks of democracies scattered along throughout the centuries, torn to pieces by anarchy, the evil spirit of democratic institutions, the time of our existence seems insignificant and our inspiration is somewhat dispelled.

Moreover when we survey the republican governments now existing, there is more discouragement than inspiration. The South and Central American republics have not shown the enlightenment and stability necessary to commend them to students of political history. The Republic of Mexico is one only in name, and her greatest fame and glory seem to be centered in the reign of a ruler whose power is autocratic in the extreme. France as a republic has drenched the last century in blood, and is a striking example of a people unable to make changes and work out reforms through tedious, lawful and peaceful means. In the last seventy-five years she has passed through at least four revolutions, and there is almost universal lack of faith in her stability. Blot out the experiment being tried in the United States, and the term "Republic" would scarcely be respectable in the eyes of the civilized world.

Our source of *weakness* has been long and well understood. The prediction was early made, and has been constantly repeated since, that on account of a certain inherent weakness in our governing power as applied to the enforcement of our laws and the preservation of social order, sooner or later our experiment of self government would prove a failure. During the last twenty years many things have happened giving strength and confirmation to this prediction. In fact some students of political history look upon these occurrences of the last twenty years as the beginning of the end predicted.

These thoughts are not advanced in a pessimistic spirit, but as unpleasant and unwelcome facts, which should receive patriotic consideration. We have no right to close our eyes to that which surrounds us and most vitally affects our highest interests, and to base our faith in our future existence, simply on the fact that we have not perished in the past. We have no right to conclude that the fountain of liberty and security is inexhaustible, simply because we have drunk so deeply from that fountain in the past.

We are on the threshold of a new era in the affairs of mankind. The world is overflowing with indications that great disturbances are to take place in the next generation or so of time. In 1848 the spirit of political revolution was abroad throughout a large portion of the civilized world, and shook or overturned the foundation of thrones and states. The spirit of revolution is again abroad and is active in the most important nations of the world, but this time it is more particularly the spirit of social and industrial revolution. There is a powerful and ever increasing force organizing throughout a large portion of the world, directed against old and long established institutions and ideas. Whether we like it or not, or whether we are ready for it or not, we cannot escape the responsibility of meeting and settling a large number of questions which have been raised concerning our social and industrial systems. Questions of this character have been at the bottom of nearly all the serious and threatening disturbances we have had in this country for many years. And, while in European countries the policies of kings and emperors, and the movements of navies and armies are the most direct menace to their peace and indeed to the peace of the world, yet deeper than these it will be found that the agitation of social and industrial questions more seriously threaten the peace and perpetuity of those countries. The time is coming when the question will be, not what kings or emperors, but what are the people going to do.

There is a deeper significance in the agitation of today than there has ever been before. Prof. Albion W. Small in a recent article in the *American Journal of Sociology* explaining and illustrating what has come to be known as the "*Social Movement*" of our time, says in substance, that men used to accept the situation and try to make themselves as comfortable as possible in it, but that today they propose to change the situation: that besides trying to better themselves in the condition to which they were born, they now try to better the condition itself: that they are not content with trying to get better wages, but that they want to overthrow the wage system: that they do not stop with plans to provide for a rainy day, but that they want to abolish the rainy day: that they are not satisfied with improvements in the working of governments—that they want to eliminate governments: that they look with contempt upon adjustment of relations between social classes, as they want to obliterate classes: that the emphasis today is on *change* of conditions rather than upon *adjustment* to conditions.

In the storm center of the agitation that has been, and that is to be, we find the labor question.

All the numerous questions growing out of the relation between capital and labor, the distribution of wealth, the control of corporations, the subjection and overthrow of trusts and combines, seem to find utterance and expression through the laboring man. When the actual contest comes on we find him in the front rank of battle. He seems to be the David who goes to the front to contend with the giants of greed and monopoly. And if he and his organizations have in many respects become tyrants, it must be remembered that they have fought their way inch by inch, up and out of the Egypt of darkness and bondage, against masters whose tyranny was manifold greater. History, for instance, affords no more heroic battle, and no more resplendent victory, for themselves and for civilization, than that which has been fought and won single handed and alone,—against all odds, by the trades unions in England within the last thirty-five years. It is therefore not hard to understand, why, in the solution of these questions the greatest danger to government centers in labor agitation, labor contests, and especially in strikes.

According to a recent report, some eminent person, who was lunching with Mr. Gladstone, asked him what was the greatest danger threatening Great Britain—was it France, Germany, Russia or America? And his reply was: “None of them, the only danger I foresee is from the trades unions and their attendant strikes.”

Fortunate indeed will be that nation or government, which can even by force of arms preserve itself against the attack which may be made, but more fortunate still will be that nation or government, which, in a spirit of fairness and equity can settle all these questions by lawful and peaceful means.

Will our government be one of the more fortunate ones?

The inherent weakness in our system upon which forebodings of disaster have been based, is that we have no effective means of suppressing insurrection or a defiance of law and authority, where the resisting element is made up of the people themselves in large numbers. When the people, the governing power, revolt, who is to put them down? That is the vital question.

We have but a small standing federal army and the sentiment of the people is against any material increase of it to say the least. The use of federal troops in labor troubles even where there is no question as to the legality of their use, is decidedly obnoxious to the people. In cases where there is a controversy as to the legal right to use them, the most bitter feeling and opposition are incited. Experience has shown that in such cases the militia is of little value.

Even more obnoxious than the use of the federal troops is the use of a force of special officers, marshals or detectives—especially if, as is usual in order to make them more effectual, they are brought from a foreign locality. Upon all important occasions where there has been a disturbance of order,

testing severely the strength and effectiveness of the governing power, very large bodies of the people have been involved as the disturbing element, and the most intense and bitter feelings have been excited. Several times, during the last twenty years, did we almost cross that fine boundary line between anarchy and a government of the people. Several times we have seen the chord between adverse elements stretched to its utmost tension. On several occasions we have lived under the reign of anarchy and mob violence. There have been times when many of our people felt very much as they did when the guns of the confederacy opened fire on Fort Sumter.

The most important and extensive strikes which have taken place in this country during the last twenty years or more, have depended for success mainly on unlawful interference with the rights of property and the liberty of the individual, supported by force and violence. But for the use, or contemplated use, of unlawful means, most of these strikes would have gone to pieces sooner or would never have been instituted.

The danger lies not alone in the unlawful acts committed by the strikers themselves, but also in the acts of those who seek only the opportunity to burn and destroy when once the law is prostrated and trampled under foot. But to find the most serious danger look beyond the strikers and the mob, and you will find it in the people themselves. It lies in the fact that, in the underlying principle involved in the strike, the sympathy and support of the people has been so strongly in favor of the strikers and against corporations and their managers, that they, the people, have at times forgotten their obligations as citizens of the republic, and given aid and encouragement to violation of law.

The extent to which lawlessness has prevailed at times, the support and sympathy it has received, the immense value of property destroyed and the number of lives sacrificed, are now quite beyond belief, unless we refresh our memory by reading over the history of the events out of which they came into existence.

During the riots at Chicago in 1894, the most profound consternation prevailed for many days. There were days during which not only were law and authority set at defiance, but also a large portion of our people seemed to be in sympathy with this defiance. If President Cleveland had not sent the federal troops to Chicago who can say where riot and lawlessness would have stopped. This action on the part of the president was strongly opposed at the time, and has been since vigorously denounced by a large portion of our people. Whether the president was right or wrong is not material here. Another president might have refused to send the federal troops except upon the request of the Governor of Illinois, which in this case it is not likely would have ever been made. Another occasion may easily arise demanding the most vigorous and aggressive use of authority in some state where it

would be clear and beyond dispute, that the president had no authority of his own motion to send the federal troops. In view of what has happened it is easy to imagine a case, where the governor, in sympathy with the ultimate purpose sought to be accomplished by the strikers, and unable or unwilling to suppress the mob, would refuse to call for federal troops and would allow lawlessness to go beyond the power of control.

It seems reasonable in the light of past experience, and in view of the sentiment of our people, to draw the conclusion that we have no effective means and power by which to suppress disorder and lawlessness—incipient anarchy or revolution, where large bodies of our people are the moving and disturbing element, and especially where they have the sympathy of a large portion of the people.

And, moreover, there seems to be no escape from the conclusion, that our government cannot be maintained and our laws enforced by military force, by deputy marshals or special detectives. The vital and essential principle of self government is opposed to these agencies.

The fact that employers of labor have within the last several years gone to the judicial, instead of the executive departments of the government for protection, is to a great degree a confession that the use of military force of whatsoever nature has proven ineffectual, or confessedly obnoxious, and that to some extent the use of it has been abandoned. In order to escape the direct contact between the law and the agitator a new exercise of equity jurisdiction has been invoked, which bears the popular label "*Government by Injunction.*"

And whatever wide difference of opinion there may be as to the legality or expediency of the exercise of this jurisdiction in labor troubles in the manner in which it has been used, there certainly can be no substantial question that by the use and exercise of this jurisdiction, we are evading and dodging the question, which in the end sooner or later we will have to meet, and which is, whether the people are capable of self government. Government by military force or government by injunction are neither of them self government. The use of military force or the process of the courts to govern and control the acts and conduct of large bodies of the people in a republic, is like administering medicine for a disease without removing the cause of the disease. In time the remedy wears out its virtues and a stronger one is required. In a republic you cannot take away from the citizen his responsibility as an individual without at the same time impairing his value and impeaching his manhood as a sovereign. If our people cannot be governed by their respect and consideration for our laws, our institutions and our authorities, the government cannot long be maintained at all. If the people cannot govern themselves under our form of government they cannot govern themselves under any form that can be devised.

To the extent to which we put our trust and reliance on the use of the ex-

traordinary means to govern, to that extent are we sapping the strength and vitality of free institutions.

Not that these means, or at least some of them, do not have, and should not have their proper and legitimate use, but that in a republic there is a higher source of power and dependence. We have to a great extent forgotten and neglected this higher power during many years past. We have for many years been sowing broadcast a disrespect for law and authority. In the agitation of social and economic questions, as well as in our political campaigns, the masses of the people have heard over and over again the most reckless and extravagant charges and complaints, and the most violent and intemperate language. Many of our people have been made to believe, that the life of the republic has been hanging by a very slender thread. Many of them have come to believe that government with us as in many other countries means tyranny and oppression.

As a people, we need a return to our original faith and confidence in the principles of our government and in the government itself. We need a new baptism of patriotism. Universal respect for the government, as the best, and best administered on earth, for our laws, whether we like them or not, simply because they are laws, for our authorities separate and apart from their personalities, will do more to assure a peaceful solution of all questions and to maintain our government and its laws, than the largest and finest army that can be marshalled.

Again, one of the most imperative and practical needs is the fixing of the boundary line between law and lawlessness, and a thorough popular understanding as to its location.

Much of the violation of law in the last twenty years, has grown out of the confusion and difference of opinion existing as to what constituted lawlessness. The recent Bituminous Coal Miners' strike furnishes a fine illustration. During this strike, there was from the beginning a determination on the part of the strikers to resort only to the most peaceful and lawful means; and according to the law as interpreted to and understood by them they were remarkably successful. They evidently acted on the advice that they could resort to any and all means necessary to make their strike successful except actual physical force or violence, and no actual force or violence worthy of mention was indulged in by them. And yet, mark the wide difference of opinion prevailing, as to whether they committed unlawful acts, and as to what their legal rights were. Expressions of opinion from prominent newspapers, edited by the best posted of men, from statesmen, from lawyers and from judges on the bench, reveal in a remarkable manner the wide and apparently irreconcilable difference of opinion existing. On one hand it was claimed that the right of free speech and public assemblage was violated; while on the other hand it was claimed that the process of the courts, was not directed against either free speech or public assemblage in themselves but against them indulged in at such times and places and in such manner

as to unlawfully interfere with the rights of others by force of numbers, threats, and intimidation; that it was not so much public assemblage and free speech interfered with, as the purpose for which the meetings were held and the speeches were made. Judging from the wide difference of opinion expressed by lawyers and judges, they must differ radically either as to the principles of law involved, or as to the facts.

If our best informed public men, our lawyers and judges, cannot agree as to what the law is, how can it be expected that there will be harmony among the laboring men in their opinions, or responsibility for their acts and conduct.

The Supreme Court of Pennsylvania in a decision recently rendered discusses the facts and principles of law involved bearing on the question under consideration, and leaves no uncertainty as to the position of that court. However, there are perhaps other courts, especially the Supreme Courts of several of our western states, which would hold very differently, on some of the points at least.

In the case referred to, during a strike, an injunction was obtained preventing the strikers from interfering with new men who came to work. The efforts and means used by the strikers were similar to those in the recent coal miners' strike, with which we are generally familiar, except that there was no camping out. No actual violence was employed. The court held in substance, that the arguments, persuasion and appeals of a hostile and demonstrative body of men have a potency over men of ordinary nerve which far exceeds the limit of lawfulness—that the display of force, though none is used, is intimidation and as much unlawful as violence itself; that the assemblage of the strikers at the place of arrival of the new men was for the purpose of intimidating the workmen; that if the strikers desired to hold a meeting they could have met away from this place, so as not to intimidate and interfere with the new men; that the strikers had no absolute right to talk to the working men, the latter being there presumably under contract or in search of work; that their progress could not be lawfully interfered with, nor their time lawfully taken up; that even if arguments and persuasion were confined to lawfulness they were exerted at an improper time and were an interference with the plaintiff's rights. But the court said that their efforts were not confined to lawful means—that the following and importuning of the men, applying epithets to them, surrounding them and threatening them were an unlawful interference with the rights not only of the men, but also of the plaintiff. And the court, in referring to a former decision of the same court, to the effect that it was one of the indefeasible rights of a mechanic or laborer in that state to fix such a value on his services as he sees proper, and that under the constitution there is no power lodged anywhere to compel him to work for less than he chooses to accept, says: "Nor as the same right may be stated with reference to this case, to *prevent* his working for such pay as he can get and is willing to accept."

Further, the court regarded the testimony as demonstrating that the defendants were guilty of an unlawful combination, which while professing the intention of trying to maintain an outward appearance of lawfulness, was carried out by violent and threatening conduct, which was equally a violation of the rights of the new men and of the plaintiff.

The greatest difficulty, however, is that in the consideration of questions of this character, we view them more from a political, than from a legal standpoint; and the fact of the matter is, that it is impossible to remove them altogether from the domain of politics. But when we enter upon this political domain in a government of the people, we find not only that there is a fine boundary line between anarchy and a government of the people, but we also find that the boundary line between liberty, free speech, and unrestricted public assemblage on one hand, and between revolution on the other, is equally fine.

Considering the matter not so much from a legal as from a political standpoint, to say that government has no right or reserve power to interfere with the public assemblage and free speech of organized bodies of men resorting to all manner of intimidation, short of actual violence, and using the force of numbers to compel others, is simply saying that government has no power to protect and preserve itself until it is tied hand and foot and placed beyond the power of successful resistance. To undertake the administration of the government of a republic without definitely establishing the boundary line between law and lawlessness, is like trying to steer the course of a rudderless ship; and unless there are wisdom and patriotism enough in the American people to rise above their politics and partisanship for this purpose, political disaster is certain.

But the source of dependence which should be placed above all others in a government like ours, is, that in the ultimate judgment of the people there abides the most ample justice. History and experience teach that in producing results, agitation can rise no higher in the end, than the source of reason and justice from which it is fed.

In this country nearly all of the strikes in which unlawful means were used and mainly depended on, have been failures. Starting with the support and sympathy of the people the greater part of this support and sympathy has been lost by a resort to unlawful methods.

In strikes, the underlying and abiding principle of success must lie in the thoroughness with which labor is organized to control the supply of labor, and not in the interference with the rights of property or the liberty of the individual, either by physical violence, or by threats and intimidation.

It is significant that within the last year labor leaders in high position and influential labor organizations, have taken a strong and decided stand against the use of any unlawful means. Especially was it noticeable that Eugene Debs, one of the most prominent labor leaders and agitators, and the head of the "Social Democracy" movement, at Chicago some time ago,



cut himself and his followers loose from all anarchistic and revolutionary organizations.

Daniel O'Connell, who was one of the greatest agitators of this century, said that no political reform was worth the shedding of one drop of blood, and that "the man who commits a crime gives strength to the enemy."

Every reform movement must sooner or later find its level. Sooner or later it must submit its claim to the cool judgment of the people. And to whatever extent it relies upon unlawful or illegitimate methods for success, to that extent it must some day meet with disaster.

As illustrating the unstable character of movements based on force, or the contemplated use of force, and at the same time as highly instructive on several points involved herein, I refer to the two most remarkable examples perhaps in the history of this century, both occurring in England. They are, the agitation in 1843 for the repeal of the act of Union between England and Ireland, led by Charles O'Connell, and the Chartist agitation which culminated in 1848.

In the former agitation it was not O'Connell's purpose to use force, but he wished by force of numbers of men well drilled and controlled, to overawe the authorities and compel the repeal.

However, a large number of his followers, and especially the young men, became satisfied that sooner or later they would be called upon by their leader to fight for the cause. Large meetings were being continually held and at one time it was estimated that there was an attendance of a quarter of a million of people. Pending a meeting to be held at Clontarf near Dublin, which it was intended should exceed all others in numbers, the English authorities anticipating a serious breach of the peace, which to them seemed imminent, issued a proclamation forbidding the meeting as "Calculated to excite reasonable and well grounded apprehension, that its object was to accomplish alterations in the laws and constitutions of the realm by intimidation and the demonstration of physical force." O'Connell threw his influence against the use of violence and called upon his followers to obey the proclamation, and only through his wonderful influence was his request complied with, and in all probability a disastrous collision thereby prevented. But from that time on this repeal agitation was dead. The issue was forced as to whether the agitation depended on an appeal to the judgment and conscience, or to methods involving duress and force. As soon as it was determined that there was to be no fighting, those who had been expecting to be called upon to engage in a contest of force, lost not only their interest in the cause, but their faith in their leader. To them imposing demonstrations of numbers and show of physical strength meant nothing, when it became clear that they were to end simply in demonstration.

The great business depression and financial panic in England in 1837, brought into existence the movement which afterwards became known as the Chartist Petition or the Peoples' Charter. It found a ready response among

the so-called laboring class of people, but was by no means confined to that element. It carried with it the support of that large body of political and social agitators, which, actuated by principle on one hand, or hope of political advancement on the other, always casts its lot against the governing power. The movement was backed by great numbers, monster meetings and immense parades; and it was led by intelligence, earnestness and enthusiasm. There was no lack of able orators, and there was an abundance of newspapers. It lasted for ten years and grew in volume and intensity, and seldom has a country been more profoundly shaken and alarmed than was England by it. Violent and intemperate language was used by public speakers and a call to arms was common. The crisis came during the French revolution and while the revolutionary spirit was all but universal. At a national convention of Chartists held in London, the French revolution was used with telling effect as an example, and speakers openly declared that the people were now ready to fight for their charter. A great popular demonstration was arranged to be held April 10th, 1848, at Kennington Common, and it was determined that an immense procession should go from Kennington Common to the doors of Parliament with a monster petition and make such a display of physical force and numbers as to overawe the parliament and compel the granting of the charter. The English government, realizing that England was on the verge of a revolution, and that the controlling element of this movement was eager to bring on a clash with the authorities, issued a proclamation declaring the procession unlawful. Then came the test as to whether the life and vitality of this great movement, depended on peaceful agitation, or on methods of a revolutionary and war-like nature. Previous to this time, the movement had already split into two great divisions, *moral* and *physical* force chartism, and the breach now became more marked. Some were in favor of having the procession and thereby provoking a collision. It was determined that the procession should not be held. When this determination was made, those who were satisfied only with revolutionary methods, withdrew from the movement. From that time on, however, chartism was dead. The meeting was held but the attendance was very ordinary. Speeches were made, the petition adopted and the same was thereafter presented to Parliament.

Chartism did not thus suddenly die because there was no merit in its demands. Subsequent history and experience has shown that some of the demands were reasonable, and they were afterwards adopted. In fact whatever was reasonable and meritorious in its demands lived and received the approval of the law-makers and of the people. Chartism thus died a sudden death, because its life and vitality—that which made it an aggressive and disturbing force, was based on the hope and expectation in the minds of its followers, that sooner or later there would be an open rupture with the government—that in short, there was to be a revolution.

Confronted as we are by manifold and excessive agitation on every hand,

with organizations in our midst teaching anarchy and revolution, with the numerous combinations of power, and aggregations of wealth violating the rights and liberty of the individual and forcing upon us gigantic contests almost unlimited in scope and bitterness, there is indeed great peril. But if each citizen will rise to the full measure of his responsibility, both as a subject and as a sovereign, place his faith and reliance upon the ultimate justice and fairness of the people, and above all hold fast to the foundation principle that all reforms and changes necessary and proper, can be made through the lawful and constitutional methods provided, we can as a people ride every wave of social commotion, and breast every storm of political life.

There is so much inspiration, so much instruction and such abundant illustration in something said by Justin McCarthy in his "*History of Our Own Times*," and it is so applicable to our form of government and the American people, that I cannot refrain from closing this paper with a quotation from him.

Referring to the Chartist agitation culminating in 1848 to which reference has already been made, and also to the Young Ireland agitation occurring about the same time, he says:

"These two agitations, the *Chartist* and the *Young Ireland*, constituted what may be called our tribute to the power of the insurrectionary spirit that was abroad over Europe in 1848. In almost every other European state revolution raised its head fiercely, and fought out its claims in the very capital, under the eyes of bewildered royalty. The whole of Italy, from the Alps to the Straits of Messina, and from Venice to Genoa, was thrown into convulsion." \* \* \* "There was insurrection in Berlin and in Vienna. The Emperor had to fly from the latter city as the Pope had fled from Rome. In Paris there came a Red Republican rising against a Republic that strove not to be Red, and the rising was crushed by Cavaignac with a terrible strenuousness that made some of the streets of Paris literally to run with blood." \* \* \* "Hungary was in arms; Spain was in convulsion; even Switzerland was not safe. Our contribution to this general commotion was to be found in the demonstration on Kennington Common, and the abortive attempt at a rising near Ballingarry. There could not possibly be a truer tribute to the solid strength of our system. Not for one moment was the political constitution of England seriously endangered. Not for one hour did the safety of our great communities require a call upon the soldiers instead of upon the police. Not one charge of cavalry was needed to put down the fiercest outburst of the rebellious spirit in England. Not one single execution took place. The meaning of this is clear. It is not that there were no grievances in our system calling for redress. It is not that the existing institutions did not bear heavily down on many classes. It is not that our political or social system was so conspicuously better than that of some European countries which were torn and ploughed up by revolution. To imagine that we owed our freedom from *revolution* to our freedom from serious *grievance*,

would be to misread altogether the lessons offered to our statesmen by that eventful year. We have done the work of whole generations of Reformers in the interval between this time and that. We have made peaceful reforms, political, industrial, legal, since then, which, if not to be had otherwise would have justified any appeal to revolution. There, however, we touch upon the lesson of the time. Our political and constitutional system rendered an appeal to force unnecessary and superfluous. No call to arms was needed to bring about any reform that the common judgment of the country might demand. Other people flew to arms because they were driven by despair; because there was no way in their political constitution for the influence of public opinion to make itself justly felt; because those who were in power held it by the force of bayonets, and not of public agreement." \* \* \*

"We in this country were saved alike from the revolution and the reaction by the universal recognition of the fact, among all who gave themselves time to think, that public opinion, being the ultimate ruling power, was the only authority to which an appeal was needed, and that in the end justice would be done. All but the very wildest spirits could afford to wait; and no revolutionary movement is really dangerous which is only the work of the wildest spirits."

## **A Discussion of the Eleventh Amendment.**

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**BY JOHN I. GAMES.**

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Were the conditions among men perfect there would be no need of law, but we should err in affirming that there is no law. For though silent always, because never transgressed, it would still exist in absolute perfection. The human mind has sought in all ages to write the basic rules of right in statutes and constitutions. To give force to them in the conduct of life is the ultimatum of civilization, the measure of the condition of mankind.

It is unfortunate but it is nevertheless true, that the minds of men do not harmonize in their conceptions of what right is, that out of a chaos of opinion there must come unity, that law must battle her way through a maze of human differences to her rule. But it is a greater misfortune that language so far fails to express law that no mind can frame a constitution in which eminent statesmen and jurists will not construe fundamental doctrines differently. The sublime task of expressing American policies was not completed with the writing of the constitution, the interpretation and application of it has called forth the most discriminating thought that has occupied the councils of our nation. However much we may deplore the uncertainty of judicial opinion, the fact remains that the highest tribunal of the Republic has been forced to modify its constructions repeatedly. But once only have the people, by their power of amendment, placed an interpretation upon the language of that fundamental document. It devolves upon us to follow, not only the later applications of that amendment, but to trace out the causes leading to its adoption and the reason for the rule.

The case of *Chisholm vs. Georgia* is far more of philosophic than of historic value. In it are discussed profoundly man's relation to the State. It

is a noble assertion of the dignity of individual manhood, and sounds the revolutionary ring of freedom.

Although the decree may be pronounced speculative since it professes to declare that law which is not law, yet a consideration of its reasoning will answer the interrogatory why citizens shall not sue states.

The Court maintained on pure principle that the state ought to be suable. Man is perfect because he is the work of God, the State is inferior for it is the work of man. The State is subordinate to man and must subsist for his good. Government exists as a means, the welfare of man constitutes its end. The end should not be subordinate to the means. Yet governments of the past had used the lives of men to augment their own welfare. They had glorified themselves at the expense of sacrificed individual happiness and the creature should have served, ruled; that which should have given freedom, enslaved.

The State is but an artificial being having rights, ought it not owe duties? It may contract, can it not incur obligations? If it owe debts, ought it not pay them? If it demand justice, ought it not do justice? Does wrong, because perpetrated by many, become any the less wrong? Shall such wrong exist in society and be remediless?

In his primitive condition man is a sovereign. The State is an aggregation of such sovereigns. Man gives to the State what power he wills, but the supreme power abides in him, and in the assertion that "all jurisdiction implies superiority of power," Blackstone voices an unconscionable thing, for since all our law comes from the consent of the governed, that superior equals—a man.

In what sense, then, is a State sovereign? Previous to the Revolutionary War, the sovereignty resided in the throne of Great Britain; from thence it passed to the people, and we find the pre-amble to the constitution of the United States, beginning with the words, "We the People." This was equivalent to a compact granting certain prerogatives to the government. The rule by compact differs from that by Feudalism. In the latter the Prince rules; in the former, the people. The ruler in the Feudal system has personal power; in the republic, official. In the republic the official and the man in private life are equal—they are co-sovereigns.

Again let us inquire whether suability is compatible with State sovereignty. There are no subjects in America, all are citizens; they are neither low nor high, inferior nor superior. One citizen may sue any number of other citizens. It is his privilege to prosecute the largest city of the Republic, though it contain a million of people. Shall he be permitted to compel a million of citizens in one place to do justice and not in another? How can the sacredness of place thus shut the door on justice? The identical men respond in one case and draw the magical curtain of sovereignty for protection, in the other. Suability can not be incompatible with State sovereignty, for a State must respond as defendant when one State sues another. What doth

it avail whether a party is sued by one or one million? Shall right fail because of the disparity of numbers? Honesty demands that equal protection be vouchsafed to all, and that justice shall consider only the cause, not the parties. Joint sovereignties can not suffer because they appear before the same tribunal, and they should find an impartial arbitrator in some other Court than that of the State, for when two are in dispute, fairness demands that one of them shall not be the sole determinant.

The court, too, sought precedents from other nations, and as all these were drawn from prosecutions instituted by subjects, for a much stronger reason, ought suits to be upheld when initiated by sovereigns. Dan Diego, son of Columbus, sought his inheritance from Ferdinand, and losing, appealed to the council and won. We find the Ephori of Sparta and the Mayor of the Palace in France, judged the acts of Kings; that when the people of Aragon elected a King, they instructed him that they were greater than he. From Saxon times to Edward I in England, the Court was open to prosecutions against the King or Queen at the instance of any subject. In the Germanic Union, the Princes, though claiming to be sovereign, were suable before the Imperial Chamber and Aulic Council. The Great Frederick of Prussia said that "in the estimation of justice, all men are equal, whether a Prince complain of a Peasant or a Peasant complain of a Prince."

But the third, and in the mind of the Court, the conclusive argument, was found in the constitution itself, for all the reasons thus far advanced proved the United States quite as much suable as the State. From the compact, compatibility, honesty, and analogous examples thus far adduced, the Court inferred that the State ought to be suable. The question to be answered by the constitution, was, can the State be sued? That the people of the original States could vest a jurisdiction of such suits in the United States Courts, needs no confirmation. They could alter, destroy, or transfer any power which inhered in the State. The articles of Confederation operated solely upon the states. Not so with the constitution. It is the expression of the people themselves. The Confederacy was founded upon states, the Union upon citizens.

The spirit of the constitution demands this construction. How senseless becomes the law forbidding the state to impair contracts, if there exists no remedy to enforce them. Suppose the State oppresses a subject of a foreign country and he is denied the protection of courts; the State will hold within its grasp the provocations of war. When the States took their places in the Union the world ceased to look to them for the administration of American affairs, but the Nations thence-forward held the United States responsible; and this was just, for the agencies necessary to maintain her responsibility were surrendered to her. One of the six purposes for which the constitution was formed was, "to establish justice." What more fitting occasion for the exercise of this principle than to avoid partiality between States and citizens of other States. This safeguard we find incorporated in the letter of

the constitution. Though it is contended that the clause granting this protection applies only when the the State is a plaintiff, the term "controversy" ought to include all controversies, and if it was the purpose to make such distinction, it was not made in the constitution; and the word "party" ought to include defendant as well as plaintiff. In fact we witness the State made a "party" defendant in suits between States.

This interpretation of the constitution amazed the law givers of the age and they hastened to submit the Eleventh Amendment which, as already suggested, did not purport to announce any new law but to construe the old. It, in substance, declared that what the people meant to say was, that the judicial power of the United States shall extend to controversies between a State and citizens of other States when the State is plaintiff or when it chooses to become defendant. This, then, is the law, but what shall we reply to this great Court that thus leads us to the unanswered question, why? Shall we admit the conclusion of the Court's opinion and reply that every law does not rest on justice; that the Eleventh Amendment is founded on fallacy and hath no reason in it? Rather let us seek to reply in the array of conditions that demand such a rule, and the catastrophes that follow its abrogation.

Society demands one greater than any other. It must be conceded that there be a sovereignty; one who shall declare law and none shall deny it to be the law; that there shall be one who shall say "go" and "come", and his mandates prevail unquestioned; that there must be one to settle disputes and his decrees remain unchallenged. For if there be no inequality, if one man shall be as authoritative as a million, we shall have as many independent sovereignties as we have citizens, and we shall be involved in hopeless confusion. If a sovereign state may be sued it is equivalent to admitting that what it says is law, may not be law; that what it commands to do may not be done; that what it decrees may be attacked in the forum of some Court aside from that of the State for final adjudication—aye, more, the suability of a state implies that some greater may coerce it, and that a stronger exists at whose behests the State must bow and obey. It must needs be that there shall be an end of equals, and that in the degrees of inequality, we shall come to the greatest one, whose voice shall speak and all others shall hear; that it shall declare "this is my law; you shall not dispute it, for it is I." This sovereignty we have in "the people of America" and they are greater than any individual for their rights are the added rights of all; if they conflict, the individual, not the State, must fall.

We pause here to distinguish the State from the government of the State. The government of the State is a lifeless piece of machinery through which the State operates; the State is the men composing it. Herein lies the fallacy of the expression of Louis XIV. He did not perceive that he was the government and that the unsceptered multitudes of France composed the State. On this delusion was founded the divine right of kings and every



despotism of the past. Here, too, our learned judges failed to differentiate. They confused the officials composing the government with the men composing the state. They argued rightly that these officials are co-equal with the citizens in private life but they disregarded that greater being whose members constitute every man within its bounds, and whose servants these officials were.

It is true that the divinity which hedged about the King has no place in our institutions. Under the feudal system the King could do no wrong, but his servants suffered because of their ill council. Following this line of thought, the state can do no wrong, for the error, being imputed to its officials, exempts it from all burdens of guilt. By this reasoning it was asserted that the States did not secede from the Union; that it was the vain attempt of the usurping governments of the States. Whatever wrong was done, the governments did, not the States. And yet this argument does not meet the approval of all minds. To such the voice of the people is not always the voice of God. The immunity, they insist, is based upon grounds of public policy. The conditions of society are such, that States like men, are forced at times to choose between two evils. The enactment of laws may work hardships, but their absence will entail yet greater harm. The good of the most must prevail. If a man's pleasure trench upon the happiness of the community, it must abate; if his conduct curtail the necessary freedom of his fellows, he must amend it. No single man's rights are paramount. This is the price he pays for the protection of common rights, that all rights may not be sacrificed to the rapacity of anarchy. Man agreed to surrender all the law forbids when he entered the original compact of society, and so long as men live in communities, the rights of the most shall form the metes and bounds of the rights of the minority. What degradation then is there in the surrender of unimportant rights which would attach to man if he lived alone on earth, for the absolute existence of basic rights which the State guarantees? By this compact with his fellow citizens, man, in substance said, that he would abide by the will of the majority, that what it determined was law, he would obey as law; that he would conspire with none to defeat or repress that will in councils, Courts, or in any manner whatsoever. This is the fealty which every citizen swears to the State when he accepts its blessings. It is his to obey, the majority's to command. If he then seek to invoke a power higher than the State to coerce it, he thereby strives to violate that solemn compact to which he is a party. By the terms of that original compact, then, he agreed that he could not sue a State, for the power to sue implies the power to control.

This attribute of sovereignty -the immunity from suits -all independent nations possess. The American States at the close of the Revolutionary War, possessed it; and in only one instance did they surrender such pre-rogative, namely: When one State sues another State. This, then, is the law,

but its application has given rise to many delicate and difficult problems. It is not always easy to determine when a State is made a party. The fact that it is not named in the record is in no wise conclusive, but the general character of the entire record must be consulted. If the remedy sought, will operate against the State and compel it to specifically perform its contracts, the Court will not grant it. When New York and New Hampshire attempted to cheat the law by providing for the assignment of private accounts to themselves and under the guise of a suit by a State, to compel Louisiana to fulfill her contracts with their citizens, the Supreme Court did not hesitate to look beyond the record to the real parties in interest and deny the relief. But out of a sense of justice the Courts have gone far in holding States not to be parties to suits, even though some interest of the State depends upon the decision. This border-line of cases that has been upheld and that forms the limit of the individual's privilege to sue, has been grouped into three classes.

I. Let us examine those cases where property of the State or property in which the State has an interest, comes within the control of the Court without being taken by force from the State. The Court will adjudge the interests of all parties irrespective of who they are. Thus where the Schooner, *Davis*, as a common carrier, was transporting a cargo of cotton, belonging to the United States, from Savannah to New York, in 1865, the vessel was saved from destruction by one Douglas and others, who, according to the custom of the seas, libelled the ship and cargo at the New York port for salvage. This they did before the cotton passed into the possession of the United States' officers, and the Court held, that so long as her officers could acquire possession of the goods without colliding with those of the United States, they were at liberty to do so. The Government must have actual, not constructive possession to defeat the process of the Court.

In the same year, the *Siren*, a blockade runner, was captured in Charleston, S. C. and taken to Boston. While passing through the dangerous Strait of Hurlgate, leading into Long Island Sound, she carelessly sank the Sloop, *Harper*. The *Siren* was condemned and sold as a prize, the owner of the *Harper*, intervening by petition. The marine law is such, that when a vessel negligently harms another a lien attaches to the vessel doing the harm in favor of those damaged, and it was affirmed that when a Court ordered the sale of such vessel, even though a vessel of the United States, it might decree the payment of such claims out of the proceeds, since they came affected with all liens. It was further declared that in case the State sued a citizen for value, he might offset any claim he had against the State.

Again in the case of *Clark vs. Barnard* this principal appears. The Boston, Hartford & Erie R. R. Co. delivered to the State of Rhode Island a bond for \$100,000 as a forfeiture in case it should fail to complete a branch of its road within a certain time. The Corporation became insolvent. Its assignee filed a bill in equity to restrain the State Treasurer from collecting

the bond. In the course of the proceedings, the money was paid into Court on an interlocutory decree. This conferred jurisdiction and the Court adjudged the property rights of both parties in question. So cases illustrating this rule might be multiplied but its application is not difficult.

II. The second class is where an officer is sued in tort for some injury inflicted upon another's person or property, to which charge, the officer pleads as a defense, that he acted under the order of the government. It should be observed that when officers act under statutes they do so at the peril of being able to prove that such statutes are valid. The simple plea of official capacity avails nothing. The existence of a constitutional law alone protects, and if this be wanting, an officer is in effect an individual trespasser.

In the year 1805, in a treaty with the Cherokee Indians, the United States Government retained a tract of land three miles square for a garrison, below the mouth of the Highwassee River. By error the fort, with extensive works, was constructed above the mouth of the River, and when the title of the land was questioned by the real owner, in Court, it was promptly decreed that the officials were trespassers acting without authority of law.

Again during the Mexican war, one Harmony, with the sanction of the commander of the expedition, took a wagon train of merchandise into the hostile country. Col. Mitchell, an officer in the U. S. army, when the exigencies of the situation did not demand it, seized and put to use this private property, for which the Court compelled him to respond in damages.

The United States has a law providing for the confiscation of liquor found in what is known as "Indian Country." Under this act Captain Bates of Ft. Seward, in what was then the Territory of Dakota, seized liquor belonging to a merchant, believing it to be within "Indian Country". But it appearing that the liquor was not within the Territory designated by the Act of Congress, Bates was liable.

These applications of the rule are ample; the second like the first line of cases is simple and little discrimination is necessary to distinguish that, in such cases, citizens are not suing States. The third rule, however, is burdened with greater niceties and over it there has been much litigation.

III. This class of cases arises where the law has imposed upon an officer a definite duty respecting some particular thing, not affecting the general powers or functions of the government, but in the doing of which duty, individuals have interests that may be enforced by judicial process. In these cases mandamus or injunction will lie to compel or restrain an officer in the performance of a ministerial duty.

Thus in *Marbury vs. Madison*, the Court compelled by mandamus, the Secretary of State to deliver a commission as a Justice of the Peace to the Plaintiff, because, not holding his office at the will of the President, his right was vested when the commission had been signed and transmitted to the Secretary's office. The case of *United States vs. Schurz* is an illustra-

tion of the same rule. *Mandamus* was held to be the proper remedy to secure the patent for land when the officers, whose action is necessary to vest the title in the claimant, have decided in his favor and the patent to him has been duly signed, sealed, countersigned and recorded. The title had passed to him and only the ministerial duty of delivering the deed remained.

In the case of *Davis vs. Gray*, the Court enjoined the officials of Texas from granting patents to the alternate sections of land lying along the railroad track, the land having been granted to the Company. Likewise, in the case of *Osborne vs. Bank of the United States*, an injunction was granted to restrain a State officer from placing money of the bank, which he had illegally seized as taxes, into the State Treasury.

At this juncture we must distinguish two vastly different lines of cases. For by means of injunction and *mandamus*, citizens have frequently attempted to compel officers of the State to perform her contracts. Whenever life, liberty or property are threatened under an unconstitutional law, the citizen may defend himself by *Habeas Corpus*, by defense to prosecution, by injunction, by *mandamus*. In other words when he is moved against, he may defend; but this is an entirely different thing from coercing the State to fulfill its contracts. The former is an indefeasible right, the latter is never a right. Thus in the case of *Hagood vs. Southern*, it was attempted to compel South Carolina to receive certain script in payment of taxes. The Court replied that it could not substitute its discretion for that of either the legislative or executive departments; that officers could be moved through the State, but the State could not be moved through the officers, and that the Court was powerless to force the State to perform its contracts.

In *Louisiana vs. Jumel*, we find a bill brought in equity to compel the Auditor of the State to pay out of the Treasury, overdue interest on its bonds, and to enjoin him from paying any part of the taxes collected for that purpose, for the ordinary expense of the government. The Court replied to this that there had been no setting apart of funds, and that the money was in no sense the bondholders'; that the granting of the relief would require the general administration of the financial affairs of the State; the controlling of assessments and disbursements; and would completely oust the Supreme political power of its function.

The State of Georgia, in order to secure itself on a mortgage against the *Macon & Brunswick R. R. Co.*, procured the appointment of a receiver, and from him bought the road. Holders of later bonds filed a bill to foreclose their mortgage and to set aside the sale to the State. But it was pointed out that the officers named as defendants, had no personal interest in the subject matter of the suit; that the title to the road vested in the State; that the relief sought rendered the State an indispensable party, and the Court refused to take jurisdiction of the suit.

In conclusion, then, the State can never be sued save when it grants permission through its leniency. Whatever advantage it may acquire in trans-

actions with individuals, it can hold, by resting on its immunity from suit, but should its property fall peaceably into the toils of the law, the Court will not refuse adjudication; should its officers neglect to perform their duty as defined by law, they may be compelled so to do, and if they attempt to act under the color of a void law, they may be restrained; but the actual enforcement of contracts, the initiative of suits against the State, does not lie within the power of individuals; but when the State seeks to disturb the repose by becoming the actor the plaintiff can the citizen vindicate his contractual rights. Honesty demands good faith on the part of the State in all her dealings with men, but it doth not lie in the mouth of Courts to command it.

## Constitution and By-Laws.

### CONSTITUTION.

ARTICLE 1. The name of the Association shall be The Bar Association of the State of Kansas.

ART. 2. The object of the Association shall be the elevation of the standard of professional learning and integrity, so as to inspire the greatest degree of respect for the efforts and influence of the bar in the administration of justice, and also to cultivate fraternal relations among its members.

ART. 3. The officers of the Association shall be a President, Vice-President, Secretary, Treasurer, and an Executive Council of five members.

ART. 4. The President shall preside at all meetings of the Association, and shall open each annual meeting of the Association with an appropriate address. The Vice-President shall preside in the absence of the President; and in the absence of both, a president *pro tem.* may be elected by the meeting. The Secretary shall keep a record of all the proceedings of the Association, and conduct the correspondence of the Association.

ART. 5. The Treasurer shall keep an account of all funds of the Association. The Executive Council shall manage the affairs of the Association, subject to the constitution and by-laws.

ART. 6. A quorum for the transaction of business shall be twenty members.

ART. 7. No person shall be admitted to membership of this Association who is not a member of the bar of the Supreme Court, and who has not been engaged in the regular practice of the law for one year next preceding his application for admission.

ART. 8. All applications for membership shall be referred to the Executive Council, who shall report the same to the Association, with their recommendation thereon; and no person shall be admitted to membership except by a two-thirds vote of the members present. Each member shall pay an admission fee of five dollars, and annual dues of three dollars.

ART. 9. The annual meetings of the Association shall be held in January of each year, at the capital, at such time as the Executive Council fix. Thirty days' notice of the annual meeting shall be given by the Secretary. Special meetings may be called by the Executive Council, of which meetings thirty days' notice shall be given to the members by the Secretary.

### BY-LAWS.

SECTION 1. The Executive Council shall, on or before the first day of May of each year, designate such a number of members, not exceeding six, to prepare and deliver or read at the next annual meeting thereafter appropriate addresses or papers upon subjects chosen and assigned by the Council to

each of said members, as may be so selected for such purpose.

SEC. 2. The order of exercises at each annual meeting shall be as follows:

1. Opening address by the President.
2. Consideration of applications for membership.
3. Reports of Secretary and Treasurer.
4. Report of Executive Council.
5. Reports of standing committees.
6. Reports of special committees.
7. Delivering and reading of addresses and papers.
8. Miscellaneous business.
9. Election of officers and delegates to American Bar Association.

SEC. 3. There shall be chosen by ballot, at each annual meeting, three members as delegates to American Bar Association for the ensuing year.

SEC. 4. All addresses delivered and papers read before the Association, the copy of which is furnished by the author, shall be lodged with the Secretary. The annual address of the President, the reports of committees, and all proceedings of the annual meeting, shall be printed; but no other address delivered or paper read shall be printed, except by order of the Executive Council.

SEC. 5. The terms of office of all officers elected at any annual meeting shall begin at the adjournment of such annual meeting, and end at the adjournment of the next annual meeting. And in case of any vacancy, the Executive Council shall appoint some member to fill the vacancy, who shall hold until his successor is elected.

SEC. 6. The Treasurer's accounts and reports shall be examined annually by the Executive Council before their presentation to the Association, and the Executive Council shall report the result of such examination of Treasurer's report and accounts to the Association at its annual meeting.

SEC. 7. The Executive Council shall cause to be printed such a number of copies of the proceedings of its annual meeting as it shall deem best, not exceeding one thousand copies, and shall distribute the same to members of the Association, and to such other persons, or associations, or societies, as they may deem prudent; and shall, with the proceedings of each annual meeting, print the roll of active and honorary members of the Association, and its constitution and by-laws.

SEC. 8. Every member of the Association shall pay to the Treasurer on or before the first day of May, of each year (after the year of his admission), annual dues of three dollars. All members who have not paid their annual dues on or before May 1st shall, within thirty days thereafter, be notified of this fact by the Treasurer and requested to forthwith comply with the requirements of this by-law.

SEC. 9. The Secretary shall keep a "general membership roll" on which shall appear in alphabetical order the name of every member of the Associa-

tion from its organization, with the date of his admission.

The Secretary shall also keep an "Honorary membership roll" to be composed of those members who shall be specially designated for this honor, by resolution of the Association on the formal written recommendation of the Executive Council.

The Secretary shall also prepare on the first day of March in each year, the "roll of active members" of the Association for that year, which shall include only those who have paid to the Treasurer their Association dues for the preceding year and the new members by whom no dues are payable for that year.

SEC. 10. The Treasurer shall, twenty days before the first day of March in each year notify all active members in arrears for the dues of the preceding year, that the roll of active members for the year, to be printed in the Annual Report of the proceedings, will be made up on that date, and that their names must be omitted from that published roll of active members, unless their delinquent dues have been paid.

SEC. 11. Only the active and honorary members of the Association shall be entitled to participate in the proceedings of the Association, or to a seat at its annual banquet.

SEC. 12. On the general membership roll opposite each name omitted from the active membership roll, shall be noted the reason for such omission whether death, non-payment of dues, or personal request.

SEC. 13. Any member whose name has been omitted from the active membership roll for non-payment of dues, may have his name restored to such roll by the payment of the years' dues for which he is in arrears.

SEC. 14. The standing committees of the Association shall consist of the following:

Judiciary Committee Five members.

Committee on amendment of laws Five members.

Memorial Committee Three members.

Committee on Legal Education and University Law School Five members.



## Published Roll of Members.

## HONORARY MEMBERS.

## NAME AND ADDRESS.

Hon. David J. Brewer .....	Washington D. C.
Hon. Henry Wade Rogers .....	Chicago
Hon. Seymour D. Thompson .....	St. Louis
Hon. John W. Henry .....	Kansas City, Mo.
Hon. Nathaniel M. Hubbard .....	Iowa
Hon. P. S. Grosscup .....	Chicago
Hon. Samuel A. Kingman .....	Topeka
Hon. Thomas Ewing, Jr.* .....	New York City
Hon. L. D. Bailey* .....	Lawrence, Kan.

\*Deceased.

## ACTIVE MEMBERS.

## NAME AND ADDRESS.

Alden, H. L. ....	Kansas City, Kan.
Allen, S. H. ....	Pleasanton
Benson, A. W. ....	Ottawa
Bentley, Fred. W. ....	Wichita
Benton, C. E. ....	Fort Scott
Bergen, A. ....	Topeka
Berger, A. L. ....	Kansas City, Kan.
Bird, W. A. S. ....	Topeka
Blue, R. W. ....	Pleasanton
Bond, T. L. ....	Salina
Bone, H. J. ....	Ashland
Bowman, C. S. ....	Newton
Boyle, L. C. ....	Fort Scott
Broderick, Case. ....	Holton
Brown, Milton. ....	Garden City
Brown, J. U. ....	Tribune
Bryant, A. J. ....	Hays City
Bucher, Charles. ....	Newton
Burris, John T. ....	Olathe
Calderhead, W. A. ....	Marysville
Campbell, M. T. ....	Topeka
Clark, George W. ....	Topeka
Clarke, W. B. ....	Kansas City, Mo.
Cliggett, Morris. ....	Pittsburg

## ACTIVE MEMBERS—CONTINUED.

NAME AND ADDRESS.	
Coleman, C. C.....	Clay Center
Cornell, George G.....	Alma
Cowles, W. H.....	Topeka
Cunningham, E. W.....	Emporia
Curtis, C. H.....	Marion
Dana, A. W.....	Topeka
Dassler, C. F. W.....	Leavenworth
Dewey, T. E.....	Abilene
Dillard, W. P.....	Fort Scott
Dolman, J. E.....	Topeka
Doster, Frank.....	Marion
Downey, Francis E.....	Topeka
Egan, J. G.....	Chicago, Ill.
Elliott, C. E.....	Wellington
Ellis, A. H.....	Beloit
Emery, R. M.....	Seneca
Falloon, James.....	Hiawatha
Fenlon, Thomas P.....	Leavenworth
Ferry, L. S.....	Topeka
Foster, C. G.....	Topeka
Foster, F. H.....	Topeka
Freeman, Winfield.....	Kansas City, Kan.
Frith, J. Harvey.....	Emporia
Foster, F. H.....	Parsons
Garver, T. F.....	Topeka
Getty, George.....	Syracuse
Gilkeson, A. D.....	Hays City
Glasse, W. B.....	Oswego
Gleed, C. S.....	Topeka
Gleed, J. W.....	Topeka
Godard, A. A.....	Topeka
Graves, Chas. B.....	Emporia
Green, J. W.....	Lawrence
Grattan, G. F.....	McPherson
Guthrie, John.....	Topeka
Guthrie, W. W.....	Atchison
Guthrie, W. F.....	Atchison
Hagan, Eugene.....	Topeka
Hamilton, Clad.....	Topeka
Harrison, T. W.....	Topeka

## ACTIVE MEMBERS—CONTINUED.

NAME AND ADDRESS.	
Hayden, Charles.....	Holton
Hayden, Sydney.....	Holton
Heizer, R. C.....	Osage City
Herrick, J. T.....	Wellington
Hessin, John E.....	Manhattan
Hick, R. S.....	Westmoreland
Hobbs, Bruno.....	Kansas City, Kan.
Holt, W. G.....	Kansas City, Kan.
Hopkins, Scott.....	Horton
Horton, Albert H.....	Topeka
Hurd, T. A.....	Leavenworth
Huron, G. A.....	Topeka
Hurd, A. A.....	Topeka
Hazen, Z. T. ....	Topeka
Harvey, A. M.....	Topeka
Jackson, H. M.....	Atchison
Jetmore, A. B.....	Topeka
Johnson, W. A.....	Garnet
Johnson, J. G.....	Garnet
Johnson, Frank O.....	McPherson
Johnston, W. A.....	Minneapolis
Jones, Howel.....	Topeka
Keeler, Henry.....	Topeka
Kelso, David.....	Leavenworth
Kimball, C. H.....	Parsons
Kimble, Sam.....	Manhattan
Kenna, E. D.....	Chicago
Larimer, J. B.....	Topeka
Leland, Cyrus A.....	Eldorado
Lewis C. A.....	Phillipsburg
Little, E. C.....	Abilene
Littlefield, W.....	Topeka
Lloyd, Ira E.....	Ellsworth
Loomis, N. H.....	Topeka
Martin, David.....	Atchison
Martin, F. L.....	Hutchinson
Martin, John.....	Topeka
McCleverty, J. D.....	Fort Scott
McClure, J. R.....	Junction City
McFarland, E. A.....	Lincoln

## BAR ASSOCIATION OF KANSAS.

## ACTIVE MEMBERS—CONTINUED.

NAME AND ADDRESS.	
McFarland, J. D.	Topeka
McLean, Henry	Paola
Milton, B. F.	Dodge City
Moore, O. L.	Abilene
Merriam, Frank D.	Topeka
Miller, O. L.	Kansas City, Kan.
Milliken, J. D.	McPherson
Monroe, Lee	Hays City
Moore, McCabe	Kansas City, Kan.
Morris, R. E.	Kansas City, Kan.
Morris, W. H.	Girard
Mulvane, David W.	Topeka
Nimocks, G. W.	Great Bend
Overmyer, David	Topeka
Parker, J. W.	Olathe
Peck, George R.	Chicago, Ill.
Perkins, L. H.	Lawrence
Perry, W. C.	Fort Scott
Perry, Albert	Troy
Pickering, I. O.	Olathe
Porter, Silas W.	Kansas City, Kan.
Postlethwaite, John C.	Jewell City
Pringle, J. T.	Burlingame
Quinton, A. B.	Topeka
Quinton, E. S.	Topeka
Randolph, A. M. F.	Topeka
Redden, A. L.	Topeka
Riggs, S. A.	Lawrence
Roark, Wm. S.	Junction City
Roberts, John W.	Hutchinson
Rossington, W. H.	Topeka
Root, H. C.	Topeka
Ryan, Thomas	Topeka
Sedgwick, T. N.	Parsons
Seaver, B. A.	Troy
Slonecker, J. G.	Topeka
Sluss, H. C.	Wichita
Smith, C. B.	Topeka
Smith, Charles W.	Stockton
Smith, Clark A.	Cawker City

## ACTIVE MEMBERS—CONTINUED.

NAME AND ADDRESS.	
Smith, Wm. R.....	Kansas City, Kan.
Spencer, Charles F.....	Topeka
Spilman, R. B.....	Manhattan
Stambaugh, W. S.....	Abilene
Stillwell, L.....	Erie
Summerfield, M.....	Lawrence
Switzer, John F.....	Topeka
Simmons, John S.....	Dighton
Thomson, William.....	Burlingame
Troutman, J. A.....	Topeka
Tracy, B. H.....	Wamego
Turner, R. H.....	Mankato
Tufts, J. F.....	Atchison
Valentine, D. M.....	Topeka
Valentine, H. E.....	Topeka
Vance, A. H.....	Topeka
Vernon, W. H.....	Larned
Waggener, B. P.....	Atchison
Walker, Will T.....	Kansas City, Kan.
Wall, T. B.....	Wichita
Ware, E. F.....	Topeka
Watkins, Albert.....	Topeka
Webb, W. C.....	Topeka
Wells, Abijah.....	Seneca
White, T. J.....	Kansas City, Kan.
Whiteside, H.....	Hutchinson
Wilcockson, K. E.....	Oakley
Williams, F. L.....	Clay Center
Wood, O. J.....	Topeka
Worley, J. S. R.....	Osawatomie
Wilson, John O.....	Salina
Wheeler, Bennett R.....	Topeka
Wells, Frank.....	Seneca

## MORTUARY ROLL.

NAME AND DATE OF DEATH.	
Bailey, L. D.....	Oct. 15, 1891
Campbell, A. B.....	Dec. 20, 1897
Crozier, Robert.....	1895

## MORTUARY ROLL—CONTINUED.

NAME AND DATE OF DEATH.	
Douthitt, Wm. P.	Nov. 28, 1897
Everest, A. S.	Oct. 22, 1894
Ewing, Jr. Thos.	Jan. 21, 1896
Green, H. T.	
Griffin, Charles T.	
Greer, John P.	Nov. 28, 1889
Gillett, Almerin.	
Hamble, C. B.	
Harris, Amos.	Feb. 2, 1891
Holt, Joel.	April 27, 1892
Humphrey, H. J.	Aug. 8, 1890
Johns, H. C.	
Lewis, Ellis.	Aug. 12, 1897
Maltby, J. C.	April 27, 1893
Prescott, J. H.	July 5, 1891
Ritter, John N.	Feb. 8, 1896
Scott, W. W.	May 31, 1890
Stillings, E.	Feb. 8, 1890
Stephens, N. T.	
Thacher, S. O.	Aug. 11, 1895
Usher, John P.	April 13, 1889
Wagstaff, W. R.	
Webb, Leland J.	







**Sixteenth  
Annual Meeting**

**Bar Association**  
of the  
**State of Kansas**

**Held in the City of Topeka**

**January 26 and 27, 1899**

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SIXTEENTH ANNUAL MEETING

OF THE

BAR ASSOCIATION

OF THE

STATE OF KANSAS.

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HELD IN THE CITY OF TOPEKA, JANUARY 26 AND 27, 1899.

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THE TIMES,  
CLAY CENTER, KANSAS.  
1899.



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**OFFICERS FOR THE YEAR 1899.**


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**PRESIDENT** ..... C. C. COLEMAN.  
**VICE-PRESIDENT** ..... SAM KIMBLE.  
**SECRETARY** ..... C. J. BROWN.  
**TREASURER** ..... HOWEL JONES.

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**Executive Council.**

SILAS PORTER, CHAIRMAN,  
 J. C. POSTLETHWAITE, E. W. CUNNINGHAM,  
 J. T. PRINGLE, J. W. PARKER.

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**Delegates to American Bar Association.**

ABRAM BERGEN, IRA E. LLOYD, L. STILLWELL.

**Alternates.**

DAVID OVERMEYER, JOHN O. WILSON, CHAS. HAYDEN.

**Committee on Amendments to Laws.**

G. H. LAMB, J. D. MILLIKEN, CHARLES HAYDEN,  
 J. W. GREEN, R. H. TURNER.

**Judiciary Committee.**

T. F. GARVEE, MORRIS CLIGGETT, CHAS. B. GRAVEN,  
 LEE MONROE, A. M. HARVEY.

**Memorial Committee.**

JOHN C. POSTLETHWAITE, T. L. BOND, O. L. MOORE.

**Committee on Legal Education and State University Law School.**

L. H. PERKINS, W. F. GUTHRIE, W. S. ROARK,  
 SILAS PORTER, B. F. MILTON.

## OFFICERS OF PREVIOUS YEARS.

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OFFICERS FOR THE YEARS 1883-4.

<i>President</i> ..... ALBERT H. HORTON.		<i>Secretary</i> ..... W. H. ROSSINGTON.
<i>Vice-President</i> ..... N. T. STEPHENS.		<i>Treasurer</i> ..... D. M. VALENTINE.

## Executive Council.

D. M. VALENTINE, <i>Chairman</i> .	JAMES HUMPHREY,	DAVID MARTIN,
J. H. GILLPATRICK,	FRANK DOSTER.	

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## OFFICERS FOR THE YEAR 1885.

<i>President</i> ..... ALBERT H. HORTON.		<i>Secretary</i> ..... W. H. ROSSINGTON.
<i>Vice-President</i> ..... W. A. JOHNSTON.		<i>Treasurer</i> ..... D. M. VALENTINE.

## Executive Council.

D. M. VALENTINE, <i>Chairman</i> ,	JAMES HUMPHREY,	DAVID MARTIN,
E. S. TORRANCE,	L. HOUK.	

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## OFFICERS FOR THE YEAR 1886.

<i>President</i> ..... ALBERT H. HORTON.		<i>Secretary</i> ..... JOHN W. DAY.
<i>Vice-President</i> ..... E. S. TORRANCE.		<i>Treasurer</i> ..... D. M. VALENTINE.

## Executive Council.

W. A. JOHNSTON, <i>Chairman</i> ,	JOHN GUTHRIE,	A. W. BENSON,
M. B. NICHOLSON,	JOHN H. MAHAN.	

**OFFICERS FOR THE YEAR 1887.**

<i>President</i> .....	SOLON O. THACHER.	<i>Secretary</i> .....	JOHN W. DAY.
<i>Vice-President</i> ....	HENRY C. SLUSS.	<i>Treasurer</i> .....	D. M. VALENTINE.

**Executive Council.**

W. A. JOHNSTON, <i>Chairman</i> ,	C. B. GRAVES,	ROBERT CROZIER.
GEORGE S. GREEN,	T. F. GARVER.	

**OFFICERS FOR THE YEAR 1888.**

<i>President</i> .....	W. A. JOHNSTON.	<i>Secretary</i> .....	JOHN W. DAY.
<i>Vice-President</i> ....	EUGENE F. WARE.	<i>Treasurer</i> .....	D. M. VALENTINE.

**Executive Council.**

JOHN GUTHRIE, <i>Chairman</i> ,	S. B. BRADFORD,	GEORGE J. BARKER,
J. W. ADY,	J. H. MAHAN.	

**OFFICERS FOR THE YEAR 1889.**

<i>President</i> .....	JOHN GUTHRIE.	<i>Secretary</i> .....	CHAS. S. GLEED.
<i>Vice-President</i> .....	T. F. GARVER.	<i>Treasurer</i> .....	D. M. VALENTINE.

**Executive Council.**

B. F. SIMPSON, <i>Chairman</i> ,	W. W. SCOTT,	L. B. KELLOGG,
A. W. BENSON,	CHAS. S. HAYDEN.	

**OFFICERS FOR THE YEAR 1890.**

<i>President</i> .....	ROBERT CROZIER.	<i>Secretary</i> .....	C. J. BROWN.
<i>Vice-President</i> ....	CHAS. B. GRAVES.	<i>Treasurer</i> .....	HOWEL JONES.

**Executive Council.**

B. F. SIMPSON, <i>Chairman</i> ,	JOHN GUTHRIE,	CASE BRODERICK,
W. W. SCOTT,	R. M. EATON.	

**OFFICERS FOR THE YEAR 1891.**

<i>President</i> .....D. M. VALENTINE.	<i>Secretary</i> .....C. J. BROWN.
<i>Vice-President</i> .....L. HOUK.	<i>Treasurer</i> .....HOWEL JONES.

**Executive Council.**

T. F. GARVER, <i>Chairman</i> ,	E. W. CUNNINGHAM,	M. B. NICHOLSON,
J. R. McCLURE,	W. P. DOUTHITT.	

**OFFICERS FOR THE YEAR 1892.**

<i>President</i> .....T. F. GARVER.	<i>Secretary</i> .....C. J. BROWN.
<i>Vice-President</i> .....J. W. GREEN.	<i>Treasurer</i> .....HOWEL JONES.

**Executive Council.**

W. C. WEBB, <i>Chairman</i> ,	C. ANGEVINE,	E. W. MOORE,
WINFIELD FREEMAN,	A. A. HARRIS.	

**OFFICERS FOR THE YEAR 1893.**

<i>President</i> .....JAMES HUMPHREY.	<i>Secretary</i> .....C. J. BROWN.
<i>Vice-President</i> .....H. L. ALDEN.	<i>Treasurer</i> .....HOWEL JONES.

**Executive Council.**

J. D. MILLIKEN, <i>Chairman</i> ,	N. H. LOOMIS,	A. H. ELLIS,
SAM KIMBLE,	H. W. GLEASON.	

**Officers For the Year 1894.**

<i>President</i> .....J. D. MILLIKEN.	<i>Secretary</i> .....C. J. BROWN.
<i>Vice-President</i> .....F. L. MARTIN.	<i>Treasurer</i> .....HOWEL JONES.

**Executive Council.**

H. L. ALDEN, <i>Chairman</i> ,	SAM KIMBLE,	J. W. GREEN,
T. L. BOND,	E. W. MOORE.	



**Officers for the Year 1895.**

<i>President</i> .....H. L. ALDEN.		<i>Secretary</i> .....C. J. BROWN.
<i>Vice-President</i> .....J. B. LABIMBE.		<i>Treasurer</i> .....HOWEL JONES.

**Executive Council.**

SAM KIMBLE, <i>Chairman</i> ,	T. B. WALL,	A. A. GODARD,
E. A. MCFARLAND,	J. D. McCLVERTY.	

**Officers for the Year 1896.**

<i>President</i> .....DAVID MARTIN.		<i>Secretary</i> .....C. J. BROWN.
<i>Vice-President</i> .....WM. THOMPSON.		<i>Treasurer</i> .....HOWEL JONES.

**Executive Council.**

A. A. GODARD, <i>Chairman</i> ,	T. B. WALL,	W. R. SMITH,
M. B. NICHOLSON,	JOHN W. DAY.	

**Officers for the Year 1897.**

<i>President</i> .....WM. THOMPSON.		<i>Secretary</i> .....C. J. BROWN.
<i>Vice-President</i> .....S. H. ALLEN.		<i>Treasurer</i> .....A. A. GODARD.

**Executive Council.**

C. C. COLEMAN, <i>Chairman</i> ,	JOHN W. ROBERTS,	LEE MONROE,
MCCABE MOORE,	C. B. GRAVES.	

**Officers for the Year 1898.**

<i>President</i> .....S. H. ALLEN.		<i>Secretary</i> .....C. J. BROWN.
<i>Vice-President</i> .....C. C. COLEMAN.		<i>Treasurer</i> .....A. A. GODARD.

**Executive Council.**

C. B. GRAVES, <i>Chairman</i> ,	J. D. MCFARLAND,	LEE MONROE,
L. C. BOYLE,	MCCABE MOORE.	



## Minutes of the Sixteenth Annual Meeting.

TOPEKA, JANUARY 26, 1899.

The sixteenth annual meeting of the Bar Association of the State of Kansas was called to order at 2 o'clock p. m. in the supreme court room, with the President, Stephen H. Allen, in the chair.

The reading of the minutes of the last meeting was dispensed with.

The executive council, by J. D. McFarland (its President, C. B. Graves, being absent on account of sickness) reported to the Association the names of the following applicants for membership and recommended their election: W. F. Evans, Topeka; H. G. Larimer, Topeka; P. P. Campbell, Pittsburg; G. H. Lamb, Yates Center; W. E. Saum, WaKeeney; Noah L. Bowman, Garnett; M. M. Miller, Topeka; F. P. Cochran, Cottonwood Falls; W. T. McBride, Wellington; H. P. Farrelly, Chanute; J. D. Houston, Wichita; Z. S. Wise, Hutchinson; W. E. Stanley, Wichita; W. S. Glass, Marysville; Geo. E. Stoker, Topeka; C. J. Dobbs, Topeka; J. S. Dean, Marion; Wm. L. Burdick, Lawrence; C. J. Evans, Topeka; J. D. M. Hamilton, Topeka; W. D. Gilbert, Atchison.

This report of the Executive Council was adopted and the lawyers named were duly elected members of the Association.

A. A. Godard, the Treasurer of the Association, presented the following report, which, having been found correct by the Executive Council, was on motion of John Martin accepted and adopted:

### REPORT OF TREASURER.

Balance on hand at last report .....	\$192.66
Admission fees .....	75.00
Dues of 1897 .....	177.00
"    " 1898 .....	306.00
"    " 1899 .....	8.00

Total receipts, - - - \$758.66

**Expenditures—vouchers attached:**

Expense of banquet of 1898 .....	\$256.00
D. A. Valentine, printing 1,000 copies of proceedings and programs..	250.50
C. C. Coleman, postage and expenses as chairman Executive Council..	29.00
Rental of chairs for meeting of 1898 .....	5.00
A. A. Godard, Treasurer, postage and record book .....	13.50
Printing envelopes, cards, circulars, etc., .....	16.35
C. J. Brown, Secretary, postage and expenses.....	26.50

Total expenditures, - - - \$596.85

Balance on hand \$156.81.

The memorial committee, through J. W. Green, its chairman, reported to the association that, since its last meeting, death had removed six of its most distinguished members—all prominent and highly respected lawyers of this state: R. B. Spilman, A. M. F. Randolph, J. R. Hallowell, W. C. Webb, E. A. McMath and R. G. Robinson; and as a part of its report the committee presented a sketch of the life, and tribute to the memory, of each of the deceased brothers which had been contributed at the request of the committee by personal friends. These several personal memorials were adopted as the expression of the Association of its high estimate of the life and character of the deceased members, and of its sense of loss through their death.

## **Memorial to R. B. Spilman,**

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**BY THE MEMORIAL COMMITTEE OF THE BAR OF BILEY COUNTY.**

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Be it forever remembered that, at this hour, this Association pauses in the performance of all other duties to express in loving and lasting words our high appreciation and heartfelt esteem for our late Judge, the Hon. R. B. Spilman, who received promotion to the supreme court on high on the evening of October 19, 1898, A. D.

Judge Spilman was first appointed to preside over the 21st Judicial District by Governor Martin, in the year 1885, and continued in the discharge of that high duty up to the hour of his death, to the perfect satisfaction of both the bar and the people.

Born in the then wilds of Indiana on August 17, 1840, his life was that of a pioneer in the development of the great west. In his young manhood he devoted himself to his country and its flag by years of hard service on the field of battle, retiring from that great civil conflict with the well earned title of captain of Co. K., 86th Indiana Infantry. He was admitted to practice the profession of the law at Crawfordsville, Indiana, in March, 1866, and immediately thereafter moved forward with the resistless tread of advancing civilization to his last earthly home on the broad plains and in the clear sunshine of Kansas. Soon he brought to that home in the "beautiful city" his beloved helpmate, Hannah Russell Spilman, to whom he was married on May 14th, 1868.

Here was builded and consecrated a home and a household ever full of all that was loving and noble in human conduct; here was practiced in quiet simplicity all those Christian virtues typical of the better life; here have grown the children under the gentle guidance toward perfect manhood and womanhood, now the objects of our special sympathy and interest; here, surrounded

by her loving children, dwells that beloved wife, the widow, sustained, we hope, by our sincere sympathy in her loneliness and her grief.

While his great life was hers, yet by reason of its very greatness, it extended far beyond that household, and we beg the privilege to sympathize and mourn with her; to assure her and her children of our deep interest in them as the loved ones of him whom we so much esteemed and now seek to honor.

For all the years of his life prior to his call to the bench, Judge Spilman was prominently and closely connected with all public affairs. He was recognized as a safe and conscientious practitioner of the law. He was identified with all the educational interests of his city and county, and was always a recognized pillar of strength in the church of which he was a member. He served as county superintendent of schools, several years as city attorney, and at an important period, guided the affairs of his city as mayor; for over thirteen years he served his home county as prosecuting attorney, retiring from this important office to accept the call to the bench.

Having assumed the judicial ermine in his district, his whole life was devoted to the conscientious performance of every duty incumbent upon an honest and upright judge. His honesty was unquestioned; his integrity universally recognized; his high judicial attainments conceded by bench and bar alike, while his impartiality, his fairness and his patience in dealing with questions submitted to him, won the perfect confidence of attorneys and litigants.

Therefore in perpetual commemoration, be it

Resolved, by this Bar Association of the State of Kansas, that, we shall ever hold in memory an appreciative recollection of our judge and shall always cherish his conduct and the faithful discharge of his duties as typical of all that could be desired of one in such position.

That it shall be our purpose to emulate his virtues and maintain the high standing of courts of justice pleasing to his conception of the administration of the law, and that,

"We hope to see our pilot face to face  
When we have crossed the bar."

## Memorial to W. C. Webb,

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BY G. C. CLEMENS.

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Who can write a sketch of a lawyer's lawyer life? His deeds are written, not in the dust, but beneath it; and often the curious of the next generation must search in vain for more of the greatest lawyer than his mere name. His proudest forensic achievements, as brave, as potent, as the achievements of the great warrior whose exploits are upon every schoolboy's tongue, and often more enduring, too, are witnessed by only a few of his brethren at the bar and upon the bench and leave no trace upon the memory of the public. Who of today has read a brief of Romilly, of Erskine, of Scarlett, of Brougham, of Grattan? Who knows ought of the forensic battles of Patrick Henry, the greatest American advocate of his day? Lawyers cite and judges peruse the reports of the United States Supreme Court of the first half century of the Republic and admire the virile ratiocination of the able members of that "more than amphictyonic council," for it is a legal superstition that "there were giants in those days;" but lawyers and judges alike pass utterly unnoticed the name—for seldom more than his name is there—of the Webster, the Wirt, the Rawle, or the Pickney, whose labor and whose mighty force of intellect produced the opinions for which credit is given to a Marshall or a Story alone. Webster's political speeches are extant and a few of his jury speeches; but who reads the powerful arguments which, through the Federal Supreme Court's decisions moulded the government, and gave birth to constitutional doctrines which for weal or woe rule American legislation today? If death end not all, but, as I like to believe, those gone before still take an interest in the affairs of this world, a Shakespeare, or even a blind Homer, dead so long the learned doubt he ever lived, may look back and see his works perused and his name a household word in every civilized land on the globe; but the lawyer labors of the lawyer of even the last generation are already scarce known,

and fortunate indeed will be the now living lawyer who, unless it is preserved from oblivion by triumphs elsewhere than in the forum, shall have so much as his name remembered two generations hence. Even great judges are forgotten. How many of the Lord Chancellors or the Chief Justices of England can the English lawyer name without glancing at "Campbell's Lives"? Marshall and Story, remembered as great judges, and Taney, remembered for his merciless slave-driver logic; besides these three, how many of the judges of the Supreme Court of the United States before the Civil War are known to the American lawyers today? Yet not a judge has ever sat upon bench of a court of last resort for one short year but has left upon his country or his state an impression to help make or mar its destiny; not a judge of a court of last resort but in some unread opinion has written a tragedy as pathetic as ever a Sophocles wrote—a tragedy of some home or soul. As to reporters, alas! they are but names, and, in these days, unnoticed names. We know Johnson's reports; we remember Wheaton and Peters; Wallace and Otto are not yet strange upon lawyer lips; but lately we know only the number on the volume; we scarce ever think of the poor, patient plodder who compiled it in travail.

Does this seem a novel introduction to a dead lawyer's memorial? Novel it may be, but all know it is painfully true. And it finds apt illustration in the career of this sketch's subject. Judge W. C. Webb, who died at his home in Topeka, April 19, 1898, had spent over thirty years at the Kansas bar as a conspicuous member of that bar. He was for some years a judge. Fifteen volumes of the Kansas Supreme Court reports bear his name as reporter. As a lawyer, he was engaged in some of the most important and widely interesting Kansas cases argued during more than a quarter of a century. But, as a rule, the occasions which gave rise to those law suits have passed already from the memory of the public, from even the memory of the bar; and his work as lawyer, reporter and judge lies buried in the great charnel house where the labors of all lawyers before him lie forgotten; where the work of all lawyers after him will lie forgotten, too. It were vain to seek to recall his lawyer labors to memory here; for these lawyer records preserved by this association will fare as all other lawyer records and be themselves forgotten by even the few who will ever know them at all. No lawyer lives, as a lawyer, a life that can be written or preserved. In other fields he may win lasting laurels and may bind the exotic bays upon his forensic brow and thus come to be remembered by posterity as a lawyer in his day. The forum witnesses the bravest battles of intellect known anywhere in this world, and often for the noblest causes of conflict, too; but the forum is a cemetery of fame, which yields not up its dead and to which even the resurrection trump will be but silence deep. What use were it, then, to speak of a dead brother lawyer as a lawyer? We who knew him can remember of Judge Webb what was said of another—"He toiled terribly." He was tireless, unsparing of himself, in the preparation of his cases. He was dogmatic, opinionated, as good lawyers are



wont to be; but it was dogmatism of sure knowledge, not of conceited ignorance. He was courageous, and knew well the courtesy due the lawyer at the bar from the lawyer on the bench; was never crouching or obsequious, but ever asserted the manly independence of the bar, too often yielded now. He mastered his cases, and came to the trial or the argument of them with every point thought out and fortified. We know all this. But how long will anybody know it? How pitiable, if this were all! How pitiable the poor creature whose whole mature life has gone only into briefs and jury trials. He is doomed to the oblivion he deserves. No lawyer has a moral right to be merely a lawyer. His profession gives him power and opportunity to mould public opinion; power so great, opportunity so ample, as to make startling the responsibilities they impose. On the occasion of a great man's death, Wendell Phillips once spoke of how empty, in that day of agitation for freedom for the slave, looked in retrospect the life of a man who had taken no part in the conflict of opinions. In these days of agitation of far deeper significance, how paltry seems the life of a public man over whose bier his friends cannot say that he ever uttered one word on the great social problems we are solving against our will. Here, let us be thankful Judge Webb's life entitles him to be remembered. He did take part, a soulful part, in the movement now in progress for humanizing society.

In earlier life, Judge Webb published a Democratic paper in Pennsylvania; but, listening to the cry of the slave, he abandoned his political creed and helped organize the Republican party. Nor did his new enthusiasm cease there. When the inevitable clash of arms came; when the best blood of the nation was demanded to expiate a great national sin; when the ideas of the new party took tangible form in bayonets and canon, he went forth to battle for the cause of the slave; and so valiantly did he serve that he left the conflict a colonel at its close. Many Republicans of old abolition days rested from their reform labors when the slave had become a man, and even berated Wendell Phillips for disturbing the public peace by demanding justice for the laborer, white or black. Not so Judge Webb. A few years ago, when already past the time of life when it is said men cease to form new opinions, he flung himself with energy into the new movement for the emancipation, not of a single race, but of mankind; and, growing more radical with age, was, when death claimed him, ready to battle in the van with the most advanced social and political reformers of the day.

Of Judge Webb's ancestry I have not spoken. I am sure he would not wish it mentioned, though it was honorable, for he disdained the practice of searching in graveyards and scraping the moss from tombstones for evidence that one *ought* to be of some consequence in the world. It may be true that "blood will tell;" but it is nevertheless true that the veriest clod in any embeccle asylum had as many ancestors as Solomon or Plato, and, perhaps, as brilliant, too. Nor have I mentioned that he was seventy-four at his death. longevity in itself is nothing. Byron died at an age when most men are get-

ting ready to begin to live, yet he did a full life's work.

We live in deeds, not years; in thoughts, not breaths;  
In feelings, not in figures on a dial.  
We should count time by heart throbs. He most lives  
Who thinks most, feels the noblest, acts the best.  
Life's but a means unto an end.

Measured by this, the only true standard, Judge Webb lived a full human life. For he was a man of feeling, of kindly impulses which took not merely a public turn. Not from him, but from the lips of those he had befriended, have I heard of his unostentatious, brotherly generosity. Beneath an exterior bristling with pugnacity, he had a good, warm, tender heart. He felt for the miserable; and this, in my estimation, is his proudest right to be remembered. From what I knew of him through more than twenty years, I would accord him the epitaph Lowell wrote for Tom Hood:

Stranger, if to thee  
His claim to memory be obscure,  
If thou wouldst learn how truly great was he,  
Go, ask it of the poor.

## Memorial to Asa M. Fitz Randolph,

BY WEBSTER WILDER.

On the first day of last September passed away a member of this association of long and honored standing, Asa M. Fitz Randolph, best known to the bar of this state as attorney general and supreme court reporter. He was born in Allegany county, New York, January 19, 1829.

In 1851 Mr. Randolph graduated from Allegheny college in Pennsylvania, after a preparatory course at Alfred Academy in New York. From 1854 to 1859 he was an instructor in the High School at Covington, Kentucky, and a law student at the same time. In 1856 Allegheny college conferred upon him the degree of Master of Arts.

In 1859 Mr. Randolph was admitted to the Kentucky bar. But soon after the outbreak of the war he enlisted on the union side with the Forty-first Kentucky Regiment.

In 1868 Mr. Randolph came to Kansas, settling first in Lawrence and then shortly afterwards in Burlington, where he entered upon the practice of his profession. For two terms he was county attorney of Coffey county. In 1874 he was elected to the office of Attorney-general for the state of Kansas.

In 1878 Mr. Randolph was elected to the legislature. In April 1879, he became reporter for the supreme court of Kansas. He held this office for eighteen years. The first "Randolph" is the Twenty-first Kansas, the last, the Fifty-sixth.

Mr. Randolph could not have with the state bar a more living nor a more eloquent memorial to his name than those thirty-six volumes, so often consulted by every Kansas Lawyer. Into them he put the best fruits of a legal scholarship and a classical training which are all too seldom encountered in this practical day and age. Like so few men nowadays upon emerging from

college walls he kept in active touch with the old Latin and Greek masters as well as with those of our own literature. One of his friends has said of his private library, which was a very rare one: "A literary man's books; the collection of a lifetime; books that his taste had selected; books that lived with him and that grew into him. He was especially well read in the Bible, Shakespeare, Swift, Lamb, Burton's Anatomy and the expounders of books like these. Books about words were a constant joy to him; dictionaries, encyclopedias and the like."

In 1893 was published his "Trial of Sir John Falstaff," a book of great interest to all Shakesperean students.

Mr. Randolph's verbal mastery of what he read was well nigh marvelous. No one so apt as he with a quotation from his favorite author, the "myriad-minded" Shakespeare, nor none could so infallibly give the quotation in the author's own words. This same faculty was also shown whenever quotations from law writers were cited. He could always detect mis-quotations or tell how the same point was touched more at length by the same writer in a later edition "on page 273."

Mr. Randolph never married and at the time of his death was living alone in his home in Topeka. Upon his death a memorial service was held there by his near friends, when his remains were taken to Nortonville, Kansas, for final interment.

## **Memorial to J. R. Hallowell,**

BY MAJOR W. B. SHOCKLEY.

James Reed Hallowell was born in Montgomery county, Pennsylvania, December 27, 1841, and died at Crawfordsville, Indiana, June 24, 1898.

At the commencement of the war of the rebellion he was a student at Asbury, now DePauw, University, from whence he enlisted as a private in the Eleventh Indiana Infantry, April 18, 1861.

He was honorably mustered out of the service December 18, 1865. March 13, 1865, he was brevetted Colonel of U. S. Volunteers for "gallant and meritorious services during the war."

He was with General Patterson at Winchester in 1861, and at the first taking of Romney, Virginia; was at Calhoun, Kentucky, and in the battle of Fort Donelson in February, 1862, where he was severely wounded in the hip and arm; was at the battle of Shiloh and siege of Corinth, and in the campaign with General Buell through Tennessee and Kentucky in 1862; he was in the battles of Perryville, Stone River, Liberty Gap, McMinville, Chattanooga, Lee and Gordon's Mills, Chickamauga, and again at Chattanooga; when the rebels were driven from Lookout Mountain, and Mission Ridge; in all the battles of General Sherman's Atlanta campaign, and numerous battles and skirmishes in the pursuit of Hood's army, in the campaign of General Thomas in the Autumn of 1864, and the battles of Franklin and Nashville, and the pursuit of Hood's army after its rout at Nashville.

During his services he was in forty-three different battles and skirmishes. After the war Colonel Hallowell moved to Cherokee county, Kansas, and soon became prominent as a lawyer and a statesman. He served four terms as State Senator, and in 1879 was elected Congressman-at-Large for the state of Kansas, but was unseated by the House of Representatives, which decided

that the state was not entitled to additional representation.

He was afterwards appointed United States District Attorney, and served with distinguished ability, after which he, in a measure, retired from political life and continued the practice of law. It was not his privilege to attain a ripe old age. His health failed and he began to suffer from his old wounds; and among relatives and loving friends he passed away.

As a citizen and civil official, Colonel Hallowell exhibited the same qualities that made him conspicuous in the army. His integrity was unquestioned, and nothing could cause him to deviate from what seemed to him to be the path of duty. Fear was something he did not know, and friendship was something more than a name.

## **Memorial to Edwin A. McMath,**

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BY C. J. BROWN.

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Edwin A. McMath was the son of Rev. Robert McMath, a Presbyterian Clergyman. He was born at Three Rivers, Michigan, October 21st, 1849, and died August 29th, 1898, in Webster, N. Y., the village in which his childhood and boyhood days were spent.

He received his early education and college preparatory training in the Webster Academy, and in 1870 was graduated from Hamilton college with high scholarship honors.

The law was his chosen profession, and his studies in this line commenced at once after leaving college; but much of the time from 1870 to 1875 was filled with educational work. For one year he was principal of the Academy of Lawrenceville, N. Y., for one year professor of Greek and Latin, in the State Normal School at Bloomsburg, Pa.; and for three years he filled the important position of school commissioner in Monroe county, N. Y. During the three years he held this office of school commissioner he was active and influential in the educational affairs of the county and state, and during two of those years was president of the New York State Association of School Superintendents and Commissioners.

In January, 1875, he was admitted to the bar of Monroe county, N. Y., and commenced the practice of his chosen and loved profession in the City of Rochester. In the next seven years he had realized a most generous reward for the industry, ability and tact he had brought to his professional work; he had gained unusual success at the bar and had built up a remarkably prosperous and promising legal business in a large city. At the end of this seven years of his earnest work and brilliant accomplishments at the bar there came into his life its first cloud—the cloud of ill health, which ever after

shadowed his business life. In 1882 broken health compelled him to leave his business and his home for a climate in which he could more safely live. After spending some time in California and Colorado he settled in western Kansas and engaged in the cattle business, with the hope that the outdoor occupation of Ranch life might restore his health. As secretary, treasurer and manager of a large cattle company, he gave to this business the same zealous and intelligent energy which had characterized his work as student, educator and lawyer. Three years of this rough and active outdoor life apparently gave him back his old health and strength, and he promptly returned to the practice of law in the new pioneer home he had established in Grainfield. In those days, from '85 to '92, there was much important litigation in that part of our state, and in this field McMath was soon recognized as one of the strong and reliable lawyers of the state. But he was vouchsafed only a short term of active, successful practice at the bar in the western districts of the state and in this Capital City, for again he was compelled to relinquish active business by the serious lung and throat disease from which he had been relieved, but not cured, by a change of climate. But his active lawyer life in Kansas was long enough to impress upon his associates at the bar, and upon the courts before which he practiced, his superior ability and tact as a lawyer and his strong and beautiful character as a man.

Much of the last five years of his life was spent in the south, at Houston, Texas. The southern climate could not restore his health and he gradually succumbed to the disease with which he had been struggling so many years.

His wife, Mrs. Hattie C. McMath, and a son, Robert E. McMath, aged 12 years, survive him; to them this association extends its sincere sympathy in their irreparable loss. And here, as a tribute to the memory of the deceased, and for the comfort and benefit of his friends and associates who survive him, this association records its estimate of Edwin A. McMath—an able and honorable lawyer, whose life and character and accomplishments shed lustre on the profession and on his own name.



## Memorial to R. G. Robinson,

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BY H. D. GRAHAM.

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Robert Gamble Robinson, a member of this association, died at his residence in Holton, Kansas, on April 18, 1898. Mr. Robinson was born in Illinois in 1861, and removed with his parents to Kansas when only a few years of age. He graduated from the law department of the University of the state of Missouri in 1882, and the next year opened a law office in Holton. He was elected county attorney of Jackson county for three consecutive terms, holding the office from 1885 to 1891. He was elected as a member of the House of Representatives of the state legislature in 1895. Of him it can be truthfully said—that he was a man whose strength of character, whose sterling integrity and tenacity of purpose, the people of his county fully comprehended. He was one of the toilers who tirelessly take up the duties of every day, and patiently and laboriously build that which endures. The one great end and aim of his life was to do his duty and

He walked attended

By a strong-aiding champion-conscience,  
bringing to the labors of every day the strong common sense and vigorous interest of an earnest, faithful, honest man.

Death plans his own campaigns. He holds council with none of his victims. They are wholly at his mercy. To the many, he gives no warning, while to some he allows his approach to be seen. To our friend, whom we mourn today, death was in sight for many months. He lived in his shadow, year in and out, ever faithful to every trust, battling manfully for life until the grim messenger of death closed his eyes in peaceful and, as to all earthly scenes, eternal slumber. At the age of 37 years God's finger touched him and he slept.

The committee on Legal Education and State University Law School, through its chairman, David Martin, presented the following report, which was received and ordered to be made a part of the proceedings of this meeting:

THE BAR ASSOCIATION OF THE STATE OF KANSAS,

GENTLEMEN:

Your committee on Legal Education and State University Law School have the honor of reporting as follows:

The Law School is quite as prosperous now as during any previous school year. The enrollment of the senior class is sixty-nine (69); that of the junior class is seventy-three (73). The students with few exceptions attend the lectures and pursue their studies regularly, and appear to be making good headway toward a legal education.

Eight of the students contested for the honor of reading an original paper before this Association at the present meeting, the subject assigned being "Hypnotism as a Defense in a Criminal Action." Each of the papers evidenced industrious research, careful study and intelligent and independent thought. Any of them might be read with profit by the members of this association. Each member of your committee examined and graded these papers at his own home, one at Ottawa, one at Manhattan, one at Holton, one at Topeka and one at Atchison, with the result that one member found in favor of No. 1, one in favor of No. 3, one in favor of No. 8, and two in favor of No. 6, which took the honors—but Nos. 2, 4, 5 and 7 were not far behind those that received more favorable mention. We are now informed that No. 6 was written by Mr. H. G. Kyle, who will read it before the Association.

Prof. W. B. Brownell, so long connected with the Law School, resigned at the beginning of this calendar year to enter upon the duties of the office of county attorney of Douglas county, to which place he was elected in November last. The faculty and the students greatly regretted the severance of his pleasant relation with the Law School. It was a difficult task for the regents and the faculty to agree upon a successor to Prof. Brownell, but at length Prof. Wm. L. Burdick, of Hartford, Connecticut was chosen. He is a graduate of the Yale Law School; but though a native of New England he has traveled much, has resided in Colorado and North Dakota, and has become sufficiently cosmopolitan to "get on" with the students of a progressive western Law School. The Regents and the Faculty are to be congratulated on his selection. He will no doubt ably second the efforts of the veteran Dean of the Law School, Judge James W. Green, who has been with it from "the beginning."

We note a desirable improvement since last year in furnishing the lecture rooms with good substantial chairs in sections of five. The old chairs were light, and each was separate, which made noise and confusion almost unavoidable. The change renders the room much more quiet and orderly during the lectures. It is still necessary to use a few of the old chairs. These

ought to be replaced with new ones uniform with the others.

The time must soon come, perhaps it is already upon us, when our University Law School should lengthen its course of study to three years, if it would maintain its present high standing as an educator of young men and women for the profession of the law. Advancement in the arts and sciences, improved method of transportation, inter-communication and exchange, and the progress of civilization in many directions, have rendered it imperative that the lawyer explore new fields and familiarize himself with text books upon new subjects, and with decisions upon questions novel to the profession. Other law schools are lengthening their course, and ours must do so. The sooner done, the better. Yet if the course is extended to three years in the Law School, it should likewise be lengthened to as great a period for the student at home and the law office. The amendment of our statute law on this subject is a desideratum.

DAVID MARTIN, Chairman.

J. W. Green, of the Committee on Legal Education and the State University Law School presented to the Association his draft of a bill to regulate the admission of attorneys and providing for their examination, and asked the association to recommend it to the legislature for passage at the present session. After full discussion of this bill and the general subject to which it relates, the matter was referred to a special committee of three: J. W. Green, F. D. Mills and David Overmyer, for their further consideration, with instructions to report to this association at a later session a bill covering this important subject, and in accord with the views of this association as developed in this discussion.

On motion of Wm. Thomson the following committee was appointed to nominate to the association officers for the coming year:

Wm. Thomson, A. Bergen, J. W. Day, W. P. Dillard, J. E. Hessin, T. L. Bond and L. H. Perkins.

Harry G. Kyle delivered an address on "Hypnotism as a defense in a criminal action."

The association adjourned till 8 o'clock P. M.

#### JANUARY 26TH, EVENING SESSION.

Hon. Geo. R. Peck, of Chicago, delivered an address on "The Judge, the Lawyer and the Citizen."

Both before and after this address the association was entertained with music by the male quartet, composed of H. L. Shirer, H. E. Overholt, W. M. Shaver and James Moore.

On motion of David Overmyer the association unanimously tendered to Mr. Peck its thanks for his able and entertaining address.

The association adjourned till tomorrow at 9:30 o'clock.

## JANUARY 27TH, MORNING SESSION.

The annual address of the president was delivered by Stephen H. Allen on "The Federal Judiciary."

The Judiciary Committee, through its chairman, L. Stillwell, submitted the following report, which was received by the association and ordered by the association to be made a part of the record of its proceedings:

**Report of Judiciary Committee.****MR. PRESIDENT AND GENTLEMEN OF THE BAR ASSOCIATION:**

One of the well-known characteristics of the legal profession is a veneration for sound precedents. The members of your Judiciary Committee are no exception to this general rule, hence, when we set about preparing this report our first care was to endeavor to ascertain what the former judiciary committees of this body had said and done in the line of their official duty. Our investigations in this regard have not resulted very satisfactorily. The Bar Association of the State of Kansas was organized January 9, 1883, and no provision was made in its constitution and by-laws for a standing judiciary committee. Thus matters stood until the annual meeting in 1887, when an amendment was made to the by-laws, being section eight thereof, which provided for the creation of a judiciary committee and prescribed its duties as follows: (It) "shall be charged with the duty of observing the practical workings of our judiciary system, entertaining and examining projects for reform in the system, and of recommending such action as they may deem expedient." (Proceedings of the Association for 1887, p. 7.) Thereupon, in accordance with the provisions of this amendment, a judiciary committee was appointed, which at the next annual meeting presented an interesting and able report. (Proceedings of 1888, p. 7, *et seq.*) In 1889, the committee made a report, but it was verbal, and therefore was not published. At the meeting of 1892, the committee appointed at the meeting the previous year, presented an elaborate and carefully prepared report. (Proceedings 1892, p. 61, *et seq.*)

Although a judiciary committee has been regularly appointed at every annual meeting from the time of the adoption of the aforesaid amendment down to the last annual meeting of the association, it does not appear from the proceedings as published that any of said committees reported, except those above mentioned. The other committees, with singular unanimity, appear to have easily and happily glided into a state of "innocuous desuetude" and no reports from them adorn and elevate the records of our proceedings. Officially, they "died, and made no sign." We distinctly disclaim, however, any intention to reflect on any of these gentlemen, in view of the fact that some of the members of the present committee were also part and parcel of this sad array of delinquents. It may be that the peculiar wording of the section prescribing their duties had something to do with this official non-feasance. The Association will notice that one important branch of the duty of the judiciary com-

mittee was to "observe the practical workings of our judiciary system". It not unfrequently happened, while a member of the committee had his mental vision firmly fixed on the aforesaid "practical workings," that he observed his pet personal injury case which had blossomed into a verdict in favor of his client for five thousand dollars, or thereabouts, carried out of the judicial temple like Ananias and Sapphira, "wound up," cold in death, its limbs rigid and its eyes set, and all this by reason of the exceedingly "practical workings" of an adverse decision emanating from the aforesaid "judiciary system." The sensations which ensued, (and your committee have each and all been personally penetrated by them at different times,) were not conducive to that cool and dispassionate frame of mind so much to be desired in the study and observation of the practical workings of our judiciary system. And it is possible that considerations like these may have had something to do with an amendment which has been made to the section relating to the judiciary committee. At the annual meeting in 1896 we find that a by-law was adopted to take the place of the original section eight, and which amended by-law simply provides that the standing Judiciary Committee of the Association shall consist of five members. (Proceedings of 1896, p. 5.) Nothing whatever is said touching their duties, consequently we feel warranted in concluding that the original section which purported to prescribe the specific duties of the committee, stands entirely abrogated and annulled. Therefore we humbly conceive ourselves to be at perfect liberty with reference to our topics of discussion and our method and manner of presenting them.

"No pent-up Utica contracts our powers.

"But the whole boundless continent is ours."

But we beg the Association not to be alarmed. We shall not abuse our privileges. It is our intention to make only a few suggestions, and they shall simply be for the general "good of the order."

And, in order to be in harmony with the daily walk and conversation of the average Kansas lawyer, we shall proceed, in the first instance, promptly to grapple with one feature of the organic law of our state.

The first clause of section 16, article 2 of the Constitution of the State of Kansas, reads as follows: "No bill shall contain more than one subject, which shall be clearly expressed in its title."

It is probably safe to say that no provision of our state constitution has entailed more perplexity and labor on the bench and bar of the state, and caused more trouble and expense to suitors in its courts than the few plain and simple words just quoted. As Achilles, wrath was to Greece the direful spring of woes unnumbered, so has been to the sorely tried people of Kansas the aforesaid clause of section 16 article 2. The first note of warning concerning it which was sounded by our Supreme Court, so far as we are advised, is found in *Land Grant Railway Co. v. Com'rs of Coffey Co.*, 6 Kan., on p. 255. But evidently prior to the decision in this case, that critical and indefatigable lawyer, L. B. Wheat, of Leavenworth, had dug up the point, and sought to

impale thereon the tax-deed which was involved in *Bowman et al. v. Cockrell*, 6 Kan., 311. Here our Supreme Court was called on, apparently for the first time, to analyze and construe the language of this clause, and then hostilities commenced, and the end is not yet. A careful examination of our Supreme Court reports discloses the fact that in the fifty-eight volumes now extant there are at least sixty-six cases wherein the constitutionality of the statute involved in each case was challenged on the ground that it was obnoxious to the aforesaid constitutional provision. In fifteen of these cases, the contention was sustained, and the statutes in question were adjudged invalid. In the others, the statutes attacked were upheld, the decisions, however, in three of the last mentioned cases being rendered by a divided court.

In the six volumes of the Kansas Court of Appeals Reports now published there are five cases wherein the same constitutional question arose. The statutes thus assailed were sustained in four cases and overthrown in one.

An examination of some of the cases wherein our Supreme Court has held that the acts under discussion were invalid for the reason that the subject matter thereof was not clearly expressed in their titles, will disclose some instances wherein the alleged titles were so grossly and palpably inaccurate that it would seem as if the justices in writing the legal epitaphs of these abortive laws had to struggle somewhat to maintain their judicial gravity. No one, to our knowledge, has ever charged that excellent gentleman and able judge, Mr. Justice Johnston, with attempting to be witty upon the bench. There is, however, a strong suspicion of subtle irony in his opinion in the case of *The State v. Mr. Dink Looker*, 54 Kan. 227. That is a case wherein the title to the act which was before the court for consideration was, like man, "fearfully and wonderfully made." The defendant had argued in favor of a reversal of the judgment, basing his argument, mainly, on certain provisions of chapter 199 of the laws of 1889. The court, by Mr. Justice Johnston, after stating the substance of the defendant's contention, answered it as follows: "A plausible argument to sustain this view was made in behalf of the defendant, and there would be great force in his contention if chapter 199 of the laws of 1889 could be treated as a valid law. From its subject matter, it appears to be an attempt to amend chapter 117 of the laws of 1871, which authorizes the release of prisoners who are unable to pay fine and costs. Evidently the legislature of 1889 attempted to change this statute by excepting from its provisions those who were imprisoned for violations of the prohibitory law. It was an unsuccessful attempt. Instead of amending chapter 117 of the laws of 1871, which treats upon this subject, the legislature provided for amending chapter 147 of the laws of 1871, and looking at this chapter we find it to be a special act setting aside a public park in the town of Auburn, in Shawnee county, for a school site on which to erect a public building. The title to Chapter 199 of the laws of 1889 is wholly inappropriate to the subject matter contained in the act. It is 'An act to amend section one of 'An act relating to the release of persons confined for failure to pay any fine or costs, and amendatory of

section 1 of chapter 147 of the session laws of 1871.' This title purports to give the title of the original act, but strangely enough that which is given is neither the title of Chapter 147 nor of Chapter 117 of the laws of 1871. As the title utterly fails to express the subject of the act, the statute and every provision thereof is absolutely void. This statute being held to be invalid, Chapter 117 of the laws of 1871 is an existing law, and as it contains no exceptions, there is no force in the objections made by the defendant."

Whereupon, slightly paraphrasing the poem of Eugene Ware, (*State v. Lewis*, 19 Kan. 266.)

"The defendant wildly squirmed,  
When the Court was heard to say,  
In a cold, impassive way,  
'Let the judgment be affirmed.'"

Chapter 108 of the laws of 1897 is seemingly another instance of a blunder in the title of the act. It reads: "An act to amend section four of Chapter twenty-eight, general statutes of 1868, by providing for the interchange of judges in the several judicial districts of the State." The act itself begins as follows: "That section 2, Chapter 87, laws of 1870, as amendatory of section 56, Chapter 80, laws of 1868, is hereby amended so as to read as follows," etc., etc.

On turning to the act mentioned in the title, (viz: sec. 4, Chap. 28, Gen. Stats. 1868.) we find that it provides for the cases in which a judge *pro tem.* of the district court may be selected. The law, however, which the body of the act undertakes to amend is an amended section of Chap. 80, Gen. Stats. 1868, which provides for a change of venue in civil cases pending in the district court.

Your committee is informed that some of the district courts of the state have already held this Chapter 108, laws of 1897, to be unconstitutional by reason of the defective title. The question, however, in some shape or other, is liable to come before the Supreme Court sooner or later, and as it is not the province of this committee to volunteer an opinion on the matter, we therefore pass on.

The title of Chapter 15, Laws of 1886, is a literary gem, of "purest ray serene." It reads as follows: "An act to amend an act of article one hundred and seventy-three, section two, of the laws of eighteen hundred and seventy-two, Chapter thirty-seven, amendatory of Chapter twenty-three of the laws of eighteen hundred and sixty-eight, of an act for the encouragement of agriculture; took effect March seventh, eighteen hundred and seventy-two."

This title is surely qualified to take favorable rank with the legal instrument drawn up by Caesar Kasm, the old-time lawyer mentioned in Judge Baldwin's delightful book, "Flush Times in Alabama and Mississippi." Old Kasm owned a few negroes and being heavily in debt, and holding firmly to the sentiment—"Base is the slave that pays," he personally prepared some

kind of a document covering his negroes, which writing, the author says, was drawn with such infernal artifice and diabolical skill that none of the lawyers in the county were able to decide, by a legal construction of its various clauses, whether the negroes belonged to old Kasin, or to somebody else, or whether they belonged to anybody at all.

Where the author of this Chapter 15, laws of 1886, got his idea about "Article one hundred and seventy-three," that he was apparently seeking to amend, will probably forever remain a mystery. The various other statutes mentioned in the title give no satisfactory clue. But after writing the title, the statesman seems to have become weary, and consequently in the body of the act simply made a bold dash and amended "section two of article one hundred and seventy-three of the laws of eighteen hundred and seventy-two," and let it go at that.

In the Centennial year 1876, some gentleman was in our state legislature who evidently thought that that was an appropriate time to fix by law the weight of certain agricultural products. There was already a general law in force on the subject, being Chapter 116, Gen. Stats. of 1868. This law provided, in substance, that whenever any of the commodities therein named should be sold by the bushel, in the absence of any special agreement to the contrary, such bushel should consist of a certain number of pounds as fixed by said act. Our Centennial law-maker took his pen in hand to improve this statute in certain respects, but, "strangely enough," as Mr. Justice Johnston remarked in the Looker case, *supra*, he omitted any reference whatever to the *bushel*, so that the act as passed and crystallized in the laws of 1876 as Chapter 148 thereof, (omitting the taking effect section,) reads as follows:

"An Act defining the weight of flax seed and castor beans, barley and sweet potatoes."

"Be it enacted by the Legislature of the State of Kansas:"

"Section 1. That hereafter the weight of castor beans shall be forty-four pounds, as weighed by the ordinary scales in use in the state; and that the weight of flax seed shall be fifty-four pounds, the weight of barley shall be fifty pounds, the weight of sweet potatoes shall be fifty pounds.

"Section 2. All laws and parts of laws in conflict with this act are hereby repealed."

This is a sample of "progressive legislation" with a vengeance, and it stood "statute and ordained" until the meeting of the next legislature in 1877. That body enacted a general law on the subject of weights and measures, and restored castor beans &c., to their normal *avoirdupois*.

We have thus endeavored to point out a few specimens of the mischiefs resulting from careless, or hasty legislation; next in order is the suggestion of a remedy. We have just one idea to advance, and will try to state it in a few words. For the purpose of avoiding the continual danger which exists that provisions in the body of a statute may be adjudged invalid for the reason that they are not clearly expressed in the title thereof, we believe that the



legislature should provide for a standing committee in each body thereof to be styled—Committee on the Title of Bills. These committees need not, and should not in our opinion, be composed of more than three for each body. They should, however, consist of the ablest and most experienced lawyers in the Senate and the House, and they should be specially charged with the duty of examining the subject matter of pending bills and their titles, with the power to make and report such amendments as would, in their best judgment, relieve any features in a bill from a valid charge of being obnoxious to any of the provisions of Section 16, Article 2 of the Constitution. It would not, in our opinion, be necessary to refer to these committees every bill which might be introduced, for only a small percentage thereof ever reach a third reading. But when a bill does arrive at the stage when it is subject to be put on its final passage, it should then be referred to a committee of the character we have indicated, and not placed on its final passage until the committee shall have reported, and its report shall have been acted on.

Having thus suggested to the Association our plan for remedying, so far as possible, the mischief we have been discussing, we will now submit it without further argument, and pass to the consideration on only one more subject, and that we shall treat briefly.

Until within comparatively recent years, the custom has been general in this State, according to our best knowledge, information and belief, for railroad companies to issue passes to the judges of our Supreme, appellate and district courts, and, generally speaking, to all State officers, including members of the legislature. This custom was so universal, and had been acquiesced in and encouraged so long, that, until lately, when any public official declined a railroad pass, he was in danger of being regarded by respectable and sensible men as either a crank or a demagogue. It was more than suspected that he was simply making a "grand stand play" in furtherance of some sinister design, in comparison with which the acceptance of a railroad pass would be an act to be emulated by Abou Ben Adhem. In consequence of this feeling, it can be truly said that many men in official position accepted and used railroad passes who in their inmost hearts deprecated the practice and deplored its existence. But of recent years there has been manifested a growing disposition on the part of our public officials, especially the judiciary, to keep "hands off" from such gratuities. Some years ago a statement, (and which we believe to be true,) went the rounds of the press of our State to the effect that the judges of our Supreme Court had declined to accept railroad passes and were paying their car fare just the same as the average man. When the judges of the highest court in the State have thus set the example, can not the judges of all our inferior courts safely follow it without any danger of the good-faith of their conduct being impugned? We do not wish to be misunderstood in what we are saying. We do not believe that there is a judge in our State whose action on the bench would be governed or influenced, in the estimation of a hair, by reason of the gift of a railroad pass, but that is not the

question. It is, rather, this: Is there any considerable class of people that *do* believe such a gratuity may, especially in matters of discretion, affect the action of the judge? That this feeling does exist, to a greater or less extent, among many good citizens, we apprehend can not truly be denied. In view of this, what is the plain and simple duty of the judiciary of our State? We humbly conceive that no conscientious judge can have any difficulty in answering the question. From our standpoint as lawyers we believe that in our Republican form of government the courts of our country are the principal stay and safeguard of the rights and liberties of the people. And the usefulness of the courts and their ability to maintain that high and exalted position in the good opinion of the people which is indispensable in order to command respect for their judgments, must almost entirely depend on the confidence the people have in the absolute fairness and integrity of the individual judges. So long as the people have confidence in the fairness and honesty of a judge, they will overlook, or cheerfully condone any mere ordinary errors of his judgment. But let them once become firmly imbued with the belief that the judge is unfair, that he is subject to the sway of partiality or prejudice, then they are unwilling to give him proper credit for even his most upright and meritorious decisions. Such instances will be whistled down the wind with the flippant and contemptuous remark,—“Oh, he just had to decide that way in that case.”

Just for the purpose of illustration, we are tempted to offer in evidence a “living picture” that we, and doubtless all our professional brothers, have occasionally seen. There is a farmer living adjacent to a railroad. His wheat is in the stack, and his corn, dead ripe, is standing ungathered in the field. There comes a hot, dry day in the fall, with the wind blowing almost a tornado, and shortly after a train has passed by the farm, a fire springs up near the track, and the farmer's crops, the fruit of his labor for the past year, go up in smoke and flame. An action against the railroad company ensues and in course of time comes on for trial. The plaintiff, on the day the case is set, pays his fare over the defendant railroad from his home station to the county seat, but the judge of the court rides there on a pass. And the plaintiff knows this, because on this occasion he sees the judge, or has seen him at some other time exhibit his pass to the conductor of the train. The pending case in court is one of the greatest importance to the plaintiff, for on its outcome hang all the results of a year's labor, and it may also affect his future temporal weal or woe in no small degree. And as he believes that the judge is under obligations to the railroad company for that free pass, he therefore goes into the trial prejudiced against him from the start and apprehensive of the worst. And should he lose his case, and especially should the court sustain a demurrer to the evidence, then that suitor will return to his home that day absolutely convinced that the railroad company owns the judge and that the ordinary citizen stands no show whatever in his court. And from

thenceforth, in the evenings at the little village postoffice and store, or at the blacksmith shop, or elsewhere wherever two or three are gathered together, our disappointed litigant and his sympathizing friends will tell, and re-tell, the story of the alleged unfairness and gross partiality of the judge as displayed in the trial of the "lost cause."

A railroad company, of course, is entitled to justice the same as any other suitor, and most likely the judge, (in the case supposed,) was right in his rulings, the presumption is that he was. But no presumption, in such a case, can avail in the mind of the losing party, as against the evidence furnished by that railroad pass in the judge's pocket-book.

The moral of the picture we have tried to draw is brief. If this cause of complaint yet exists anywhere among us, let the judges remove it. Let them kindly and courteously, but firmly, decline to accept free transportation from railroad companies, telegraph franks or any other similiar gratuities. We believe that in so doing they will not only have the approval of a good conscience, but will win additional respect from the bar, and, (other things being equal,) will gain and hold that which is indispensable to a satisfactory judicial career, namely, the implicit trust and confidence of the common people.

L. STILLWELL,  
C. H. KIMBALL,  
JAS. FALLOON,  
DAVID OVERMYER.

On the fifteenth of the present month the chairman of the Judiciary Committee received a paper from Mr. Overmyer containing some suggestions which he desired incorporated in the report of the committee. But the report was then already prepared, and had been signed by a majority of the committee. The suggestions, therefore, came too late to be embodied in the report, or considered by the committee. However, as a matter of due courtesy to Mr. Overmyer, I beg leave to submit his suggestions for the consideration of the Association.

L. STILLWELL, Chairman.

### **Suggestions by David Overmyer.**

#### **ORAL ARGUMENTS.**

The law should be so amended that parties applying for a re-hearing in the Supreme Court or Court of Appeals, shall have the right to an oral presentation. The tendency of courts is to cut down the time for argument—more time is thus lost than if argument was free and full. Great rapidity of movement is not a judicial virtue; haste tends to imperfect consideration, and results in errors which require so much time for their correction that in the long run

hasty judicial action results in a loss of time. Cases may be railroaded through courts, but then justice is generally railroaded out. Give the lawyer a chance and then if he does not do his duty censure him. Give at least thirty minutes for argument upon a motion for a rehearing and give the same opportunity for oral argument upon petition in error to the Supreme Court from the Court of Appeals addressed to the exceptional judicial discretion of the Supreme Court. Do not say to the world that you give every man his day in court, and then refuse him an opportunity to open his mouth in court when his case has reached that stage where an opportunity to speak is of more value than at any other stage. Do not say that every man shall be heard, and then refuse to hear him at that supreme moment when the chaff, mist and fog have been dissipated, and the very kernel and essence of the contention have been reached.

#### APPEALS IN FEDERAL COURTS.

The process of appeals to the Supreme Court of the United States and to the Circuit Courts of Appeals of the United States should be simplified and cheapened. The allowance of appeals in suits in equity and of writs of error in common law causes has become a matter of course and is now a mere empty formality. I know of no instance in which either has been denied since I have been at the bar. The constant and unvarying practice of allowing appeals and writs of error has by custom established a right. Congress should, therefore, pass an act declaring it the right of a party in a suit in equity feeling himself aggrieved to appeal therefrom, and of a party in a common law cause feeling himself aggrieved to appeal therefrom, either to the supreme court or to the circuit court of appeals, according to the character of the cause as indicative of the proper jurisdiction.

There should be no petition or application or prayer for an appeal, and no petition for a writ of error; writs of error should be wholly abolished; they are as illy adapted to the present age as wooden cart wheels made of sections or slices of sawed logs.

A party desiring to appeal should file an order with the clerk for a transcript of the record and upon filing bond to the approval of the clerk, should have the right to file his record in the appellate tribunal accompanied by an assignment of errors or petition in error. Congress should by law regulate the charges for printing records for the Federal Appellate Courts; the present enormous charges in many cases work a practical denial of justice.

Our representatives to the National Bar Association and kindred bodies should be instructed to work to this end.

#### APPEALS IN STATE COURTS.

The case made in our State practice should be abolished; it is a delusion and a snare. It is a device by which the unconscionable practitioner may impose upon his adversary the lot of infinite corrections or suffer from a false record.

The time has come when everything which occurs in a court room in the proceedings in cases should be recorded. The record should be a complete history, a perfect photograph of the proceedings. The appellate tribunal should be able from the transcript of the record to understand the very atmosphere of the trial court. The stenographer should be an official sworn and under bond, and he should be required to file the evidence in every case together with all points of objection and all rulings of the court and all exceptions actually taken upon the trial and this record thus made by him should be as authentic and import as great verity as that made by the clerk. Any matter which could not naturally be included in the stenographic record should be saved by bill of exceptions. A transcript of the record should be the record in appellate proceedings, and this should be made for the party desiring to appeal at a minimum cost.

DAVID OVERMYER.

The Association adjourned till 1:30 o'clock p. m.

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JANUARY 27, AFTERNOON SESSION.

T. F. Garver delivered an address on "The Kansas Court of Appeals."

On motion of F. P. Cochran it was ordered that the address of Judge Garver be immediately printed, and that a copy be placed in the hands of each member of the Legislature, as an aid in securing the necessary legislation for the increase of the number of justices of the Supreme Court.

On motion of T. F. Garver the following resolution was adopted:

"As judges and lawyers familiar with the business pending and to be done in the appellate courts of the state, we appreciate the fact that the necessity for relief from the work that will fall upon the Supreme Court will not end with the expiration of the time for which the Courts of Appeals were created, and that further provision of some kind is demanded by the growing needs of the state for the hearing of cases appealed from the District Courts. We realize that it is impossible for the Supreme Court, as now composed of only three judges, to transact the business of that court after the second Monday of January 1901, and believe the best provision that can be made for the future is to make such an increase of the number of the judges of the Supreme Court as will enable it to do the work that is now being done by that court and the six judges of the Courts of Appeals.

THEREFORE:

RESOLVED, The State Bar Association recommends that a proposition be submitted by the present legislature to amend Sec. 2 of Art. 3 of the Constitution so as to increase the number of judges of the Supreme Court to seven, with power, when deemed necessary, to sit in two divisions for the hearing of cases."

On motion of W. H. Morris the following committee was appointed to urge upon the legislature the necessity and policy of submitting a constitutional amendment increasing the number of Justices of the Supreme Court

to seven: S. H. Allen, T. F. Garver, David Overmyer, W. H. Morris and Jas. A. Troutman.

The committee was authorized to use twenty-five dollars for printing and other expenses of their work.

John T. Burris delivered an address on "International Arbitration."

Silas Porter delivered an address on "Jeremy Bentham."

The Special Committee: J. W. Green, F. D. Mills and David Overmyer, heretofore appointed to recommend to this association a bill to regulate admission of attorneys, reported the following bill which the association adopted as the one to be presented to the Legislature and urged for passage:

**An Act in relation to the admission of Attorneys-at-law and providing for the examination of those persons desiring to be admitted to practice law, and repealing Sections One and Two of Chapter Eleven of the General Statutes of Kansas of 1868.**

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF KANSAS:

SECTION 1. A person who is a citizen of the United States or has declared his intention of becoming a citizen thereof and who is a resident of this state and is twenty-one years of age, shall be permitted to practice law in all the courts of this state upon complying with the requirements and passing the examination hereinafter provided for.

SECTION 2. It shall be the duty of the Supreme Court and it shall have the power, to adopt suitable rules to govern the admission of Attorneys-at-law to practice in this state, and the examinations provided for in this act, and to prescribe the educational qualifications which shall be required of each person to entitle him to such examination. The clerk of the Supreme Court shall cause such rules and such amendments as may be made thereto from time to time to be printed, and shall furnish a copy of the same to such persons as may apply therefor.

SECTION 3. A state board of examiners is hereby created which shall consist of three attorneys-at-law of at least seven years' standing at the bar, who shall be appointed from time to time by the Supreme Court of this state, such examiner shall hold office, as a member of such board, for a term of three years except under the first appointment which shall be for the term of one, two and three years respectively, and until the appointment of his successor. Said board of examiners shall meet at least twice in each year at the State Capitol at Topeka and at such other times and places as the Supreme Court may direct, for the purpose of examining such candidates as may present themselves for examination who have complied with the rules of the Supreme Court and have not failed in any examination provided for in this act, six months prior to such examination. Upon the completion of an examination by the board of examiners it shall certify to the Supreme Court the name of every person who shall have passed the examination, provided such person is of good moral character and shall have in other respects complied with the

rules regulating admission to practice as attorneys and counsellors at law, which facts shall be determined by the board of examiners. Upon presentation of such certificate by the person holding the same, to the Supreme Court, it shall enter an order licensing and admitting such person to practice law in all the courts of this state.

**SECTION 4.** Examinations may be held once each year in each judicial district by the judge thereof at a time and place to be designated by such judge under the following rules and regulations:

The Judge of any judicial district desiring to hold an examination shall at least thirty days before the examination is to be held notify the chairman of the state board of examiners of the fact. It shall be the duty of such chairman upon receiving such notice to provide such district Judge with a list of questions on various topics of the law prepared by members of the board of examiners, which questions shall be used on such examination.

At the time and place appointed such district Judge shall hold an examination under all proper restrictions and regulations so as to secure a fair and honest examination. All persons who have complied with the rules and shall pay the fee prescribed by the Supreme Court and who are and have been actual residents of said district for sixty days prior to the time at which such examination is to be held and who have not failed at any examination provided for in this act within six months prior to the time of holding such examination, shall be admitted to such examination. Upon completion of such examination the Judge holding the same shall forward to the chairman of the board of examiners the names of the persons examined, the fees collected, the list of questions furnished, the answers of each of the persons examined, together with such proofs and papers governing the examination as may be required by the Supreme Court.

It shall be the duty of the state board of examiners at their next meeting to examine the papers of the persons examined and if they shall find that the same are regular and the examination of the applicant is satisfactory and that the applicant is of good moral character they shall certify the name of the applicant to the Supreme Court as a person qualified to practice law. If the Supreme Court shall find that the rules which it has prescribed governing examinations under this act have been complied with, such person may be admitted to practice law in all the courts of this state.

**SECTION 5.** Any fraudulent act or representation by an applicant in connection with his application, examination, or admission, shall be sufficient cause for revoking his license by the Supreme Court granting the same.

**SECTION 6.** Race or sex shall constitute no cause for refusing any person an examination or admission to practice.

**SECTION 7.** Every person applying for an examination under this act shall pay a fee of ten dollars. On the payment of one examination fee the applicant shall in case of failure upon his first examination be entitled to a second examination without the payment of an additional fee.

All fees provided for in this act shall be paid to the Clerk of the Supreme Court and shall constitute a fund for the payment of the expenses of the examinations provided for herein to be disbursed under the direction of the Supreme Court or a majority of the Justices thereof. The Supreme Court shall fix the compensation to be paid the members of the Board of Examiners.

**SECTION 8.** The board of examiners shall render, during the month of January of each year, an account of all their receipts and expenditures to the Supreme Court.

**SECTION 9.** This act shall not apply to graduates of the law school of the University of Kansas, nor shall it affect persons who have been admitted to practice as attorneys in this state under previous laws.

**SECTION 10.** Sections one and two of chapter eleven of the general Statutes of Kansas of 1868 be, and the same are, hereby repealed.

**SECTION 11.** This act shall take effect and be in force on and after the first day of July, 1899.

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The committee appointed at the last meeting to consider the defects in the laws concerning the Jury system of this state, and to report to this association its conclusions and recommendations on that subject, submitted the following report, which was accepted and ordered to be made a part of the record of our proceedings:

**MR. PRESIDENT:**

Your committee appointed at the last meeting of the State Bar Association to take such action as it might deem necessary and proper to secure changes in the present law with reference to the jury system in this state, beg leave to report that the majority has conferred together upon the subject, and considered the different phases of the questions presented, and while in the main they agree upon the fact that our jury laws are capable of improvement, and especially with reference to the manner in which jurors are selected under existing conditions and jury trials conducted in many of our courts; yet, they are of the opinion that it is not advisable at this time to attempt any additional legislation. The laws of this state provide for and contemplate the selection for jury duty of only well qualified and competent persons who shall be men of integrity, and interested in the proper administration of justice. In practice, however, these laws fall, very often, far short of their purpose and through the ignorance or indifference of trustees, the jury panel frequently has upon it many persons who are not fitted to be entrusted with the important duties which jurors are called upon to perform. These practical defects may perhaps be said not to be inherent in the system, but exist because of the manner in which the laws are executed. But, be this as it may it is a matter of sufficient importance to challenge our attention and secure the cooperation of the lawyers of the state in devising what shall be the best system and one most likely to produce the best results in its practical operation.



Your committee has also given some consideration to other matters connected with the jury system, more particularly with reference to the manner of exercising the right of challenge to objectionable jurors in the District Court, and the grounds for challenges for cause. They are inclined to the opinion that it would be much better if peremptory challenges could be made secretly, as is done in Missouri; for it is well known that attorneys are called upon by their clients to challenge certain jurors in particular cases who are unobjectionable to the parties concerned in other cases in which the same attorneys are engaged. It is not infrequent for jurors thus challenged to take it as a personal affront or slight upon the part of the attorney making the challenge, thus affording a cause of embarrassment in subsequent cases.

Upon all these matters, however, your committee makes no recommendations, and asks to be discharged from further service.

T. F. GARVER, Chairman.  
SAM KIMBLE,  
JOHN D. MILLIKEN,  
GEO. W. CLARK.

The committee on amendments to Laws presented the following report through Silas Porter and Frank Wells—members of the committee, (its chairman, J. D. McCleverty being absent on account of sickness):

TO THE BAR ASSOCIATION OF THE STATE OF KANSAS,

GENTLEMEN:

We are under the painful necessity of reporting that your Committee on Amendment of Laws has never been able to have a meeting. The different members have, however, individually considered the Negotiable Instruments Act proposed by the "State Boards of Commissioners for Promoting Uniformity of Legislation in the United States" and already enacted into law by the States of Maryland, Virginia and Massachusetts and the District of Columbia.

The following letter from Mr. McCleverty chairman of the committee explains his views:

TO THE BAR ASSOCIATION OF THE STATE OF KANSAS,

GENTLEMEN:

Your committee upon amendment of the law, probably through the neglect of the chairman, has failed to meet during the year and hence can not make at this time anything like a proper report. Mr. Frank Wells, however, one of the committee, has very kindly placed in my possession the report of the commissioners upon the uniformity of law appointed under the auspices of the American Bar Association for the year 1898, and believing that their recommendations are well worthy of consideration, I take the liberty of reporting herewith three laws recommended by them: One upon the acknowledgment and execution of written instruments, another upon weights and measures

and the third upon negotiable instruments, and respectfully recommend that these three proposed acts be published in the next report of our State Bar Association so that the members may have an opportunity to read and consider them, and in that way be better prepared to act advisedly in reference to recommending their enactment or otherwise in Kansas.

From the report of those commissioners it appears that this state has had a representation made up of very able men, but it does not appear that they met in conference with the other commissioners. However, the course that was adopted would seem to insure a very safe and wise result. As the matter of the framing of these proposed statutes referred to a special committee and one of their members, who had given greater attention to the particular subject than the others, prepared these bills respectively, the full committee then considered them and after that the conference and what appeared to be very wise and proper bills have been the result of this conference.

The members of the Association are doubtless aware that several years ago a Bill of exchange Law was enacted in England, which in fact is the basis of this proposed bill upon negotiable instruments. Already several of the states have adopted this proposed law in almost its exact terms, while the House of Representatives of Congress has also passed it. In Kansas, however, but very little attention appears to have been given to the subject, and hence it occurred to me that perhaps the wisest course to pursue would be to publish these proposed bills as a part of our proceedings and thus bring the matter to the attention of the profession in the State. Personally, I readily indorse all three of them and perhaps upon further consideration might indorse some of the others which are recommended but do not at the present time feel inclined to do so.

Obviously so far as the laws of the different states can be made uniform the better it would be, especially as to all commercial transactions, and in time the National Conference of Commissioners hope to recommend a law covering sales and transfers of property and thus bring about, not a complete code of laws, but complete so far as codes might seem advisable, and while not going to the extent of advising a general codification of the laws, yet it does seem safe and prudent that upon these three topics at least, we may very practically have legislation in this state.

Respectfully submitted,

J. D. McCLEVERTY, Chairman.

It is evident however that the chairman was not aware that this act had been introduced and was now pending in the Senate, through the influence of Hon. J. D. Milliken of the Board of Commissioners for the promotion of Uniformity of Law from this State.

Personally, and on behalf of other members of the committee, we recommend that this association endorse the Negotiable Instruments Act, and take steps to endeavor to secure its passage by both houses of the Legislature.

No other matter having been considered by all of the committee, we do not feel like making any further recommendation.

Respectfully submitted,

FRANK WELLS,  
SILAS PORTER.

The Association adopted the recommendation of the committee urging the passage of the Negotiable Instruments Act now pending in the Legislature, and ordered to be printed in the proceedings of the Association for its information and consideration the two following bills:

**An Act to Establish a Law Uniform With the Laws of Other States for a Uniform Standard of Weights and Measures.**

(ENACTING CLAUSE.)

1. The avoirdupois pound to bear to the troy pound the relation of 7,000 to 5,760. The hundredweight shall contain 100 of avoirdupois pounds, and the ton 20 hundredweight.
2. The barrel shall contain  $31\frac{1}{2}$  gallons, and the hogshead two barrels.
3. The dry gallon shall contain 282 cubic inches; the liquid gallon 231 cubic inches.
4. The bushel shall contain 2,150.42 cubic inches.
5. A barrel of flour measured by weight shall contain 196 pounds; a barrel of potatoes, 172 pounds.
6. The bushel of wheat to contain 60 pounds.  
The bushel of Indian corn, or of rye, 56 pounds.  
The bushel of barley, 48 pounds.  
The bushel of oats, 32 pounds.  
The bushel of corn meal, 50 pounds.  
The bushel of rye meal, 50 pounds.  
The bushel of peas, 60 pounds.  
The bushel of potatoes, 60 pounds.  
The bushel of apples, 48 pounds.  
The bushel of carrots, 50 pounds.  
The bushel of onions, 52 pounds.  
The bushel of clover seed, 60 pounds.  
The bushel of herdgrass, or timothy seed, 45 pounds.  
The bushel of bran and shorts, 20 pounds.  
The bushel of flaxseed, 55 pounds.  
The bushel of coarse salt, 70 pounds.  
The bushel of fine salt, 50 pounds.  
The bushel of lime, 70 pounds.  
The bushel of sweet potatoes, 54 pounds.  
The bushel of beans, 60 pounds.  
The bushel of dried apples, 25 pounds.  
The bushel of dried peaches, 38 pounds.

The bushel of rough rice, 45 pounds.

The bushel of upland cotton seed, 30 pounds.

The bushel of Sea Island cotton seed, 44 pounds.

The bushel of buckwheat, 48 pounds.

[Enacted in: Massachusetts Laws, 1894, Chap. 198; also in Connecticut.]

**An Act to Establish a Law Uniform With the Laws of other States for the Acknowledgment and Execution of Written Instruments.**

**(ENACTING CLAUSE.)**

SECTION 1. Either the forms of acknowledgment now in use in this State, or the following, may be used in the case of conveyances or other written instruments, whenever such acknowledgment is required or authorized by law for any purpose:

(Begin in all cases by a caption specifying the State and place where the acknowledgment is taken.)

1. In the case of natural persons acting in their own right:

On this                      day of                      18—, before me personally appeared A B (or A B and C D), to me known to be the person (or persons) described in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed.

2. In the the case of natural persons acting by attorney:

On this                      day of                      18—, before me personally appeared A B, to me known to be the person who executed the foregoing instrument in behalf of C D, and acknowledged that he executed the same as the free act and deed of said C D.

3. In the case of corporations or joint-stock associations:

On this                      day of                      18—, before me appeared A B, to me personally known, who, being by me duly sworn (or affirmed), did say that he is the president (or other officer or agent of the corporation or association) of (describing the corporation or association) and that the seal affixed to said instrument is the corporate seal of said corporation (or association), and that said instrument was signed and sealed in behalf of said corporation (or association) by authority of its Board of Directors (or trustees), and said A B acknowledged said instrument to be the free act and deed of said corporation (or association).

(In case the corporation or association has no corporate seal, omit the words "the seal affixed to said instrument is the corporate seal of said corporation [or association], and that," and add, at the end of the affidavit clause, the words, "and that said corporation [or association] has no corporate seal.")

(In all cases add signature and title of the officer taking the acknowledgment.)

SEC. 2. The acknowledgment of a married woman when required by law

may be taken in the same form as if she were sole and without any examination separate and apart from her husband.

SEC. 3. The proof or acknowledgment of any deed or other written instrument required to be proved or acknowledged in order to enable the same to be recorded or read in evidence, when made by any person without this State and within any other State, Territory or District of the United States, may be made before any officer of such State, Territory or District authorized by the laws thereof to take the proof and acknowledgment of deeds, and, when so taken and certified as herein provided, shall be entitled to be recorded in this State, and may be read in evidence in the same manner and with like effect as proofs and acknowledgments taken before any of the officers now authorized by law to take such proofs and acknowledgments, and whose authority so to do is not intended to be hereby affected.

SEC. 4. To entitle any conveyance or written instrument, acknowledged or proved under the preceding section, to be read in evidence or recorded in this State, there shall be subjoined or attached to the certificate of proof or acknowledgment, signed by such officer, a certificate of the Secretary of State of the State or Territory in which such officer resides, under the seal of such State or Territory, or a certificate of the clerk of a court of record of such State, Territory or District in the county in which said officer resides or in which he took such proof or acknowledgment, under the seal of such court, stating that such officer was, at the time of taking such proof or acknowledgment, duly authorized to take acknowledgments and proofs of deeds of lands in said State, Territory or District, and that said Secretary of State, or Clerk of Court, is well acquainted with the handwriting of such officer, and that he verily believes that the signature affixed to such certificate of proof or acknowledgment is genuine.

SEC. 5. The following form of authentication of the proof of acknowledgment of a deed or other written instrument when taken without this State and within any other State, Territory or District of the United States, or any form substantially in compliance with the foregoing provisions of this act, may be used.

Begin with a caption specifying the State, Territory or District, and county or place, where the authentication is made.

I, \_\_\_\_\_, Clerk of the \_\_\_\_\_ in and for  
 said County, which court is a court of record, having a seal (or, I,  
 \_\_\_\_\_, the Secretary of State of such State or Territory), do  
 hereby certify that \_\_\_\_\_ by and before whom the  
 foregoing acknowledgment (or proof) was taken, was, at the time  
 of taking the same, a notary public (or other officer) residing (or  
 authorized to act) in said county, and was duly authorized by the  
 laws of said State (Territory or District) to take and certify ac-  
 knowledgments or proofs of deeds of land in said State (Territory  
 or District), and further that I am well acquainted with the hand-

writing of said \_\_\_\_\_, and that I verily believe that the signature to said certificate of acknowledgment (or proof) is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court (or State) this \_\_\_\_\_ day of \_\_\_\_\_ 18—

SEC. 6. The proof or acknowledgment of any deed or other instrument required to be proved or acknowledged in order to entitle the same to be recorded or read in evidence, when made by any person without the United States, may be made before any officer now authorized thereto by the laws of this State, or before any minister, consul, vice-consul, *charge d'affaires* consular or commercial agent, vice-consular or vice-commercial agent, of the United States, resident in any foreign country or port, and when certified by him under his seal of office it shall be entitled to be recorded in any county of this State, and may be read in evidence in any court of this State, in the same manner and with like effect as if duly proved or acknowledged within this State.

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The special Committee—T. B. Wall, Charles Bucher and J. T. Herrick—appointed at the last meeting to investigate the charges preferred against C. J. Peckham by Isaac G. Reed, reported that they were unable to recommend to this meeting what action the association should take in the matter. The committee was continued for further investigation, and for a report to the next meeting.

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The Committee on Nomination of Officers for the ensuing year presented the following report:

Gentlemen of the Bar Association of the State of Kansas:

Your Committee to nominate suitable persons for officers of the Association for the ensuing year beg leave to submit the following:

For President, C. C. Coleman.

For Vice-President, Sam Kimble.

For Secretary, C. J. Brown.

For Treasurer, Howell Jones.

For Executive Council, Silas Porter, Chairman; J. C. Postlethwaite, J. T. Pringle, E. W. Cunningham and J. W. Parker.

For Delegates to American Bar Association, Abram Bergen, Ira E. Lloyd, L. Stillwell. Alternates, David Overmyer, John O. Wilson, Charles Hayden.

The report of the committee was adopted by the Association, and the persons named were declared elected to the offices to which they had been nominated.

The following appointments were announced by C. C. Coleman, the President, for the ensuing year:

*Committee on Amendments to Laws*—G. H. Lamb, Yates Center; J. D. Milliken, McPherson; Charles Hayden, Holton; J. W. Green, Lawrence; R. H. Turner, Mankato.

*Judiciary Committee*—T. F. Garver, Topeka; Morris Cliggett, Pittsburg; Chas. B. Graves, Emporia; Lee Monroe, Hays City; A. M. Harvey, Topeka.

*Memorial Committee*—John C. Postlethwaite, Jewell; T. L. Bond, Salina; O. L. Moore, Abilene.

*Committee on Legal Education and State University Law School*—L. H. Perkins, Lawrence; W. F. Guthrie, Atchison; W. S. Roark, Junction City; Silas Porter, Kansas City; B. F. Milton, Dodge City.

The addresses delivered before the Association at this meeting appear in the following pages.

Adjourned.

C. J. BROWN, Secretary.

## **President's Annual Address.**

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### **THE FEDERAL JUDICIARY.**

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**BY STEPHEN H. ALLEN.**

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The difference in sentiment existing at the time the federal constitution was framed between those who favored the English constitution as a model and the more radical democratic elements, with reference to the tenure of those holding executive and legislative offices, does not seem to have extended to the judiciary. An examination of the state constitutions existing at that time, shows that in a large majority of the states, the judges of the highest courts were elected, or appointed, to hold during good behavior. In most instances power of removal was conferred on the legislature. Apparently it was thought that this differed substantially from life tenure. The framers of the constitution of the United States in fixing the tenure of the judges of the supreme court and inferior courts followed the language generally employed in the existing state constitutions and fixed the tenure of their offices during good behavior. The supreme court was organized in February, 1790, nearly one hundred and nine years ago. It may not be amiss at this time to review the workings of the judicial system for the purpose of detecting fundamental defects in it, if any such exist.

Whatever complaint may be made against the federal courts, it cannot be justly charged to a want of character, ability, learning, patriotism or integrity in the judges. Great care has uniformly been exercised in the selection of judges, and the senate in acting on the appointments has freely exer-



cised its right to refuse to advise and consent to an appointment deemed objectionable. In the personnel of its members the supreme court has included many men of rare talents, great learning and intense devotion to the enlightened administration of the law. Probably no tribunal that ever existed has had the advantage of better membership. Nor is it probable that in the future the people of the United States will be more fortunate in the composition of that court. If the results of its labors are unsatisfactory to the people the fault is due to the anomalous position the judges occupy. They alone, of all the officials in the republic have a life tenure of office. They alone are removed from direct accountability for their conduct. Executive and legislative officers may be deposed, not only for misdeeds subjecting them to impeachment or criminal prosecution, but at the mere will and pleasure of the people, without the assignment of any cause or reason for so doing. Judges of the federal courts, secure in their positions for life, with ample salaries, are at once withdrawn from those conditions and surroundings which mould the views and largely regulate the actions of ordinary citizens. The supreme court in its constitution is like a corporation holding a perpetual charter. It never dies, and its ruling spirit never changes. (Old members pass away and new ones take their places, but the court lives on forever. The newly appointed judge, whether taken from the active practice of his profession, the bench of some inferior court or a political position, enters on his new duties with the habits of thought and the unconscious bias produced by his prior surroundings. At first he may be inclined to break away from the current of decisions on some line of court-made law. He finds, however, that he is but one of nine; that the older members give little heed to his criticisms of prior decisions, and are not in the least inclined to defer to his opinions. On the contrary, the new member is expected to show some appreciation of the wisdom which the older members of the court have gained by experience. The nature of their labors at once withdraws the judges from close contact with people engaged in common occupations and forced to struggle for existence. Ample salaries relieve them from anxiety for the future. The bond of sympathy, which in their early struggles bound them to the great multitude, for whom some measure of privation and disaster is ever present or threatening, is forever severed. Having social position, they naturally fall into the company of others similarly situated. The world they live in is superior, not only in its provisions for bodily comfort, but in its ministrations to intellectual appetites, and cultured tastes as well. Courtesies from men of great wealth and those who manage vast corporate interests, tendered in the most delicate manner, are never wanting. Nor are these loaded with any hint of obligation incurred, or purpose to influence the official action of the recipient. Nor, indeed, need those who extend these courtesies be charged with sinister motives. Nothing can be more natural than that persons of wealth should feel a friendly inclination toward men of high character occupying such honorable positions. The situation

of federal judges is as nearly like that of the hereditary aristocracy of Europe as it could well be made in a republic. Let us inquire whether their official acts disclose any pernicious effects caused by these environments. In order that there shall be a uniform construction throughout the union of the constitution and the laws passed under it, it is doubtless necessary that there should be one court of final jurisdiction, to which all questions as to the interpretation of the constitution and laws of the United States shall be finally referred. It is also well that the judges composing the court should be removed from all sectional and local influences. But is it well that they should be so placed as to fall under the influence of a class? It may seem presumptuous for any individual to review and criticise particular decisions of so eminent a tribunal as the supreme court of the United States. General tendencies, however, can only be learned from an inspection of particulars. In order to ascertain the effects resulting from the present mode of constituting the court, the tenure by which the judges hold their offices and the influences surrounding them, we must take a close and careful view of its recorded doings, and point out the broad principles enunciated in and the results flowing from the cases of marked significance.

The first case of vast importance presented to the supreme court was that of *Chisholm's executor vs. the State of Georgia*, reported in 2 Dallas, 419. It was in form an action of assumpsit brought against the State of Georgia by a citizen of another state. The jurisdiction of the court to determine the case was challenged. On the 18th of February, 1793, three of the four judges who wrote opinions in the case concurred in maintaining the jurisdiction of the court, and an order was entered accordingly. On the 5th of March, 1794, being the beginning of the first session of the Third Congress, the eleventh amendment to the constitution was proposed, and on the 8th of January, 1798, the President declared it adopted. It reads:

"Art. II. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

It will be observed that the language employed does not indicate that any change in the existing constitution was intended, but rather that it had been misconstrued by the court. It seems to have been so understood by the court itself, for in the case of *Hollingsworth vs. Virginia*, 3 Dallas, 378, it was held, that this amendment took away all jurisdiction in similar cases pending at the time it was adopted. Perhaps the next case of great importance and far-reaching in its consequences is the *Dartmouth College* case, in which it was declared that a charter granted to a corporation by King George III, was not only binding while the territory remained subject to the British crown, but that the corporate privileges conferred under it could never be changed or taken away by the State of New Hampshire, and that as the right of perpetual succession was conferred, the special privileges would continue secure

from any attack to the remotest period of time. Thus the mere will and pleasure of George III was made binding in favor of an artificial being created by himself, as against the sovereignty of the people of the state and of the nation itself forever. This case has been followed in numberless instances, and has become one of the great landmarks in our jurisprudence.

Hamilton, whose great ability and lofty purposes Jefferson fully recognized (See his *Ann. 4th Vol. Jefferson's Works*, page 451), deemed it necessary to the successful maintenance of the government that the rich and powerful should be bound to it by a community of interest. One of the means he devised to that end was the organization of a great banking corporation, which should handle the public funds and issue its notes to circulate as money, as well as transact a general banking business with the public. This Jefferson and his partisans bitterly opposed. Washington's cabinet was equally divided as to the constitutional power of Congress to create such a corporation. The question does not appear to have come before the supreme court until it was raised in the case of *McCulloch vs. the State of Maryland*, 4 Wheaton, 316. In the opinion written by Chief Justice Marshall it was conceded that the government was one of limited powers, and that no express authority could be found in the constitution for creating a corporation. It was nevertheless held that it was within the power of Congress to create a bank as an instrument for carrying on the financial operations of the government, that the bank so created might establish branches in the different states, and that it was beyond the power of the State of Maryland to impose taxes on the branch located in that state. The same question was again presented in the case of *Osborn vs. the United States Bank*, 9 Wheaton, 738, which was an action to enjoin the Auditor of the State of Ohio and others from collecting taxes imposed on the bank by an act of the state legislature. The decision in the former case was followed, and a decree entered by the circuit court enjoining the collection of the tax was affirmed. The jurisdiction of the federal court in the case was maintained on the ground that the bank derived its powers under and owed its existence to an act of Congress. This decision furnishes the foundation for the existing national banking system, as well as of federal interference with the execution of state laws by state officials.

The next great case I shall refer to is that of *Dred Scott vs Sanford*, 19 How., 393. It is impracticable in the brief space I can devote to it to summarize the views expressed by the judges in the very elaborate opinions rendered in the case. The judgment, however, was understood throughout the country as a great victory for the advocates of slavery. It called down on the chief justice and those who concurred with him, the wrath and maledictions of the abolitionists, as well as the more temperate but equally severe criticism of Lincoln and other more moderate believers in the rights of the black men. The decision denied that a free negro, whose ancestors were brought to this country and sold as slaves, was a citizen within the meaning of the constitution, and held that he had no right to resort to a circuit court

of the United States for the purpose of being relieved from a condition of slavery, in which he was unjustly held. The decision was regarded by all as a great victory for the slave-holding aristocracy of the South, and seemed to point the way for the unrestricted extension of slavery into the territories. The temper of the public mind at that time was not such as to allow a correction of this judgment by constitutional amendment or congressional enactment. The fires of sectional hatred were kindling too rapidly and political forces were too evenly divided to admit of a peaceful reversal of a judgment so obnoxious to a large portion of the people. But it was reversed by the stern logic of events, and not only the interpretation placed on the constitution by the court, but its own provisions and the laws under it authorizing African slavery were blotted out in blood.

The development of the improved system of interior travel and traffic by the construction of railroads, eagerly sought for by every community, led to much loose and ill-considered legislation authorizing municipalities and political subdivisions of the state to aid by issues of bonds in carrying forward new enterprises. The constitutional right of state legislatures to authorize such contributions was denied by some, and in early cases the courts of a few states declared such laws invalid. The question was considered at great length by the supreme court of this state in the cases of *Leavenworth County vs. Miller*, 7 Kan., 479, and *State Ex Rel. vs. Nemaha County*, Id. 542. A majority of the court held the law valid. The opposing views are very clearly and ably set forth by Mr. Justice Brewer in his dissenting opinion in the latter case, in which he summarized the purposes of such an act as a law which "takes from all the citizens the means for starting one person or corporation in business."

In the case of the *Commissioners of Knox County, Indiana, vs. Aspinwall*, 21 How., 539, decided in 1858, the Supreme Court of the United States had under consideration the validity of a subscription of \$200,000, by the Commissioners of Knox County, to the capital stock of the Ohio & Mississippi Railroad Company. The validity of the subscription was challenged on the ground that the notices of the election required by the statute had not been given. This difficulty was gotten over by the court by holding that it was for the Commissioners to determine the existence of the prerequisites of their own authority, and that their decision was conclusive after the authority had been exercised and the bonds issued. It was also said in the opinion, that a purchaser of the bonds was not required to look beyond the recitals of the bonds themselves for evidence of a compliance with the conditions of the grant of power to issue them. In support of this decision two English cases are the only authorities cited, viz: *Royal British Bank vs. Tarquand*, 6 E. & B., 327, and *Macle vs. Sutherland*, 25 E. L. & Eq., 114. In the case of *Woods vs. Lawrence*, 1 Black. 386, it was held that where the statute authorized County Commissioners to subscribe to the capital stock of a railroad on the recommendation of the grand jury fixing the amount thereof, the

Commissioners could issue interest-bearing bonds, and that it was not necessary in a suit brought for the collection of coupons to show that the grand jury fixed the terms of payment for the stock, nor was it a defense to show that they omitted to do so. It was also held that a bona fide holder's rights were not affected by the fact that the railroad company sold the bonds at a discount of 25 per cent., though forbidden to do so by its charter. In *Thomson vs. Lee County*, a case involving the validity of municipal bonds, it was held that

"If the legislature possess the power to authorize an act to be done it can by a retrospective act cure the evils which existed because the power thus conferred has been irregularly executed." In *Rogers vs. Burlington, Id.*, 654, it was held that the power given to a city,

"To borrow money for any public purpose," authorized the corporation to issue bonds to aid a railroad. In *Riggs vs. Johnson*, 6 Wallace, 166, it was held that a circuit court of the United States might compel county officers to levy taxes to pay railroad bonds by mandamus.

The principles announced in these cases have been followed, elaborated and applied in numerous cases of like character until it has become the settled doctrine of that court, that wherever legislative authority was given to municipal officers to execute bonds, the people of the municipality were utterly at their mercy, and no matter how irregularly, or even fraudulently, they may act, the bonds must be paid. This has been carried so far as to result in placing numerous county officials in jail for refusal to obey mandates of federal courts requiring them to levy taxes to pay bonds fraudulently issued for railroads never constructed. Contrast these decisions favorable to corporations and slaveholders and sustaining doubtful legislation, and still more doubtful acts of public officers in their interest with subsequent lines of decisions hereafter mentioned with reference to legislation and official acts inimical to these interests and designed to restrain corporate aggressions.

Why is it that in the judgment of the highest court in the land legislatures and local officials have such ample power to impose grievous and unjust burdens on whole communities for the enrichment of dishonest plunderers, and yet are so utterly impotent to restrain their rapacity in the exaction of charges for the use of railroads built largely with these forced contributions? Why is it that a constitutional provision can never be invoked for the protection of the people against a daring plunderer, yet can always be found to secure to him his ill-gotten gains and unmerited privileges?

The general purposes for which the union was formed are well expressed in the preamble of the constitution:

"To form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity."

The powers conferred on Congress and enumerated under the eighth sec.

tion of the first article of the constitution relate to defense against foreign enemies, the raising of revenue and procurement of necessary funds for public purposes and the expenditure thereof; the regulation of commerce, internal and external the coinage of money, establishment of a postal system and a few matters of minor importance. By other provisions restrictions both on the powers of Congress and of the state are imposed. The lines along which the general government acts affecting the daily life and welfare of the people are few. All are benefited by the shield which the concentrated power of the United States extends for the protection of all its citizens. All are affected by the amount of taxation and the system through which it is collected. All participate in the benefits of the postal system. In recent years the necessity for the regulation of commerce between the states has rapidly increased. The construction of long lines of railroad, extending through many states, and the development of vast interior commercial interests dependent on the improved facilities for transportation, and the discriminations and injustices necessarily incident to the private ownership and control of the main thoroughfares of commerce, have called loudly and persistently for the interference of Congress, and for measures of relief against what the people have regarded as favoritism, injustice and oppression exercised by the great railroad companies and tending to crush the weak and aid the powerful, to destroy industries in one locality and build up those in another from their ruins. In response to this demand, and under the express authority contained in the section of the constitution mentioned, to regulate commerce among the several states, in 1887 the Forty-ninth Congress passed an act to regulate commerce, which appears as chapter 104, volume 24, U. S. Statutes at Large. This act provided for the appointment of an Interstate Commerce Commission, and was supposed to confer on them important powers, among which were those to prevent discriminations and unreasonable charges for the transportation of persons and property. While the act was not regarded as entirely satisfactory to the people at large, it was believed that a long step had been taken in the right direction and that great good would result from it. In accordance with the terms of its provisions able men were appointed as commissioners. The failure of the act to meet the expectations of its advocates cannot be attributed to the weakness of the commissioners or any want of inclination on their part to fairly perform their duty. But by the constructions given to the law by the supreme court the commission has been practically shorn of all power. In the case of *C. N. O. & T. P. R'y. Co. vs. Interstate Commerce Commission*, 162 U. S., 184, it was held that the Interstate Commerce Commission is not empowered to fix rates in advance, but that, subject to the prohibitions that their charges shall not be unjust or discriminative, common carriers are free to make special contracts and to adjust their rates so as to meet the necessities of commerce.

"And generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

In the case of the Texas & Pacific R'y Co. vs. the Interstate Commerce Commission, Id., 179, it was held, that in determining the question as to the reasonableness of rates which discriminated in favor of shipments of freight originating in a foreign port, consigned to a point in the United States, which it must reach by lines of transportation partly within and partly without the United States, the Commission must take into consideration the competition by various routes between the point of shipment and the destination, and that domestic freight shipped from the point of entry in the United States to the same destination, was not necessarily entitled to transportation at as low a rate as that given to the foreign goods; that it was the duty of the commission to take into consideration the interests of the carrier in bidding for the traffic, as well as other circumstances, in order to determine whether the discrimination was warranted. The decision of the commission forbidding any discrimination in favor of the foreign goods was, therefore, reversed by the court. From this decision the chief justice and Justices Harlan and Brown dissented. In the case of Interstate Commerce Commission vs. C. N. O. & T. P. R'y Co., 167 U. S., 479, it was held that

"Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum, minimum or absolute, and as it did not give the express power to the commission it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just." In this case Mr. Justice Harlan alone dissented.

The effect of these decisions is to deny to the commission all power to effectually prevent discriminations or unreasonable charges. They can summon witnesses, take testimony, weigh and consider and announce their conclusions, but these are of no more force than the conclusions of any citizen, which he may form in such manner as pleases him. The vast outlay required in carrying on the important investigations contemplated by the Interstate Commerce Act profits nothing. The implications, if not the express declarations of the court, are to the effect that the railway companies may fix their own charges in each instance for any shipment to be made in the future, and that, as the law now stands, a shipper is left to the utterly worthless remedy, afforded him by an action in an ordinary court of justice, for the determination of the question as to whether the charge against him in a particular instance is reasonable or unreasonable. The court recognizes the common law rule that a common carrier must serve all on reasonable terms, but it leaves the carrier in a position where, wholly unrestrained by any public authority, he may hold up the shipper for whatever sum he sees fit to charge. There are few shipments made by any individual where the freight charges are

sufficient in amount to warrant him in litigating the question as to the right of the railroad company to exact so much through all the courts to which such a case would be carried by the company. Theoretically the law affords the shipper his remedy. Practically he has none. The great corporation or other shipper whose business is courted and sought after really obtains special privileges and favors of many kinds. He has but little or no ground of complaint. If in any instance he is required to pay more than a fair compensation for the service rendered, small competitors are required to pay yet more, and thus, through competition in the open market with them, the powerful shipper gains a positive advantage, even though his rate be unreasonably high. The effect of the various decisions rendered under the Interstate Commerce Act is well summarized by Mr. Justice Harlan in his dissenting opinion in the case of *Interstate Commerce Commission vs. Alabama Midland R'y Co.*, 168 U. S., 176.

"Taken in connection with other decisions defining the powers of the Interstate Commerce Commission the present decision, it seems to me, goes far to make that commission a useless body for all practical purposes and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to interstate commerce. The commission was established to protect the public against the improper practices of transportation companies engaged in commerce among the several states. It has been left, it is true, with power to make reports and to issue protests, but it has been shorn by judicial interpretation of authority to do anything of an effective character. It is denied many of the powers which, in my judgment, were intended to be conferred upon it."

In their report for 1897 the Interstate Commerce Commission take the same view as to the effect of these decisions, and on page 51 they say that the Interstate Commerce Commission "by virtue of judicial decision has ceased to be a body for the regulation of interstate commerce." Thus, through its power to interpret, the federal supreme court little by little has torn up and destroyed what was supposed to be a valid law of far-reaching importance. The labors of Congress in the formulation and passage of the act have come to naught through a judicial veto.

The needs of the general government call for vast revenues, and the system mainly resorted to from the foundation of the government has been one of indirect taxation, under which the taxes imposed were paid in the first instance by an importer of goods or domestic manufacturer of them. He in turn, in order to reimburse himself, necessarily adds the tax to the price of the goods when sold by him. This added sum remains included in the price to each successive purchaser, and the burden thus is finally transferred to and borne by the consumer. This system in its practical operations exempts all accumulated wealth from bearing any share of the burdens of national taxation. There has long been a demand, from at least a portion of the people that the wealthy classes should be required to contribute in some measure for



the protection afforded to their large interests by the general government. In response to this demand the act of Congress of August 28, 1894, known as the Wilson Tariff Act, imposed a tax of 2 per cent. on the amount of income received in excess of \$4,000 per year. Certain wealthy citizens, whose love of money outweighed their love of country, called on the court to relieve them from the very easy burden of so small a tax, and for that purpose applied to the Circuit Court of the United States for the Southern District of New York for an injunction to prohibit the collection of the tax. The case found its way by the usual route to the supreme court, and after a hearing and rehearing by a vote of five to four the tax was declared unconstitutional and the collection of it enjoined. In many respects this is the most remarkable decision ever rendered by any court. It not only had the effect to nullify a part of the act of Congress, duly passed by the representatives of the people in the House and the representatives of the states in the Senate, and approved by the President, but it also overturned and nullified the construction of the constitution placed on it by the supreme court from the foundation of the government. More than this, a bare majority of the court had the boldness to set at naught the doctrine of *stare decisis* which has been the foundation of the development of that vast system of laws which finds its only expression in the judgments of courts; that a thing once decided must stand as decided; that no license is given to the newly appointed members of the court to overturn the rules once clearly settled and declared by their predecessors. This decision also was rendered in the face of the oft-reiterated rule of constitutional interpretation that all doubts as to the constitutionality of a law are to be resolved in its favor, and notwithstanding the doubts generally entertained by all well informed persons who were inclined to believe the law invalid, but against the well defined and clearly expressed opinions of four of the members of the court the doubts were resolved against it. The ground of the decision was that a tax on income was a direct tax, which the constitution required to be laid in proportion to the population as determined by the census. The point to be determined was whether the tax was a direct tax within the meaning of the constitution. In the case of *Hilton vs. the United States*, decided in 1796, it was held that a tax of \$8.00 each on carriages for the conveyance of persons was not a direct tax within the meaning of the constitution, but was rather in the nature of an excise tax. William Patterson, of New Jersey, and James Wilson, of Pennsylvania, both of whom were members of the convention which framed the constitution, were members of the court, and each wrote an opinion in the case sustaining the constitutionality of the tax. All the justices who sat in the case concurred, but Chief Justice Ellsworth and Justice Cushing did not sit. In the case of *Pacific Insurance Company vs. Soule*, 7 Wallace 433, the income tax laid by the act of June 30, 1864, and amended July 13, 1866, was held to be not a direct tax, but valid. In *Veazie vs. Fenno*, 8 Wallace 533, a tax of 10 per cent. on

notes issued by state banks was held not a direct tax. In *Scholey vs. Rew*, 23 Wallace 331, it was held that

"The 'succession tax' imposed by the acts of June 30, 1864, and July 13, 1866, on every 'devolution of title to any real estate' was not a direct tax within the meaning of the constitution, but an 'impost or excise', and was constitutional and valid."

In *Springer vs. The United States*, 102 U. S. 586, the question as to what was a direct tax within the meaning of the constitution was again carefully considered, and it was held that,

"Direct taxes within the meaning of the constitution are only capitation taxes as expressed in that instrument and taxes on real estate."

The income tax levied by the law of 1864, as amended in 1865, which was in principle the same as the one before the court in the case of *Pollock vs. Farmers' Loan & Trust Company*, except that the exemption allowed was very much lower, was held valid, and that the tax so imposed was an excise or duty, and not a direct tax. All of the decisions above mentioned adverse to the new position taken by the court in passing on the validity of the act of 1894 were rendered by a unanimous court. All of the following named justices of the supreme court have concurred in sustaining the validity of laws passed on the same principle as that now declared void. In the *Hilton* case Chase, Patterson, Iredell and Wilson. In *Ins. Co. vs. Soule*, Chief Justice Chase and Justices Nelson, Clifford, Miller, Grier, Swayne, Davis and Field. In the case of *Scholey vs. Rew* there were of justices appointed after the decision of the prior case, Chief Justice Waite and Justices Bradley, Strong and Hunt. In the case of *Springer vs. United States*, in addition to those named there was Justice Harlan. Justice Field, who was counted as one making up the majority of the court in the case of *Pollock vs. Loan & Trust Company*, had participated and concurred in three of the prior cases. We have, then, the singular spectacle of five judges, one of whom was in his dotage and wholly unfit to occupy a seat on the bench by reason of his years and failing mental powers, and another whose opinion changed between the first and second decisions of the pending case, opposed by four of their associates, nullifying an act of Congress and overriding the construction of the constitution placed on it by nineteen of their predecessors, among whom was Justice Field, when possessed of the full strength and vigor of his powerful intellect. The effect of this decision is most potent and far-reaching. It denies Congress the power to place the public burdens on the shoulders best able to bear them, and in effect declares that under the constitution there can be no relief from the existing system which taxes want and necessity and exempts superfluous wealth and ability.

Perhaps it may be said that the decision in this case tends to disprove the proposition, before advanced, that the ruling spirit of the court never changes, and that it adheres persistently to its established course. While it is true that this decision is an innovation as regards the particular question

before the court, it is not so with regard to the general tendencies of the decisions of the court. When the earlier decisions were announced the attention of the court does not appear to have been so pointedly directed to the effect the tax would have on the aristocratic classes. The taxes had been levied for the purpose of meeting exceptional expenses incurred by war, and were not viewed as an effort to place a permanent load on those deriving large incomes. The Wilson bill, however, imposed the tax on the theory that it was a just and proper one to be continued and to take the place of other forms of taxation. The Pollock case denies the power to impose such a burden, and is strictly in line with the Dartmouth College case, the Dred Scott decision, the Interstate Commerce cases, and others to be mentioned. The prior decisions on this question were democratic in their tendency; this one markedly aristocratic. Can any one suggest another case of equal importance in which the conclusion of the court has been democratic in its tendency and favorable to the multitude?

As might naturally be conjectured, a court which nullifies acts of Congress designed to afford some measure of justice to the more humble classes of society, finds little difficulty in overriding and trampling down state legislation of the same character. To review all of the decisions of this character would extend this address to unwarranted lengths. I shall refer to but a few striking examples. In the case of *Reagan vs. Farmers' Loan & Trust Company*, 154 U. S. 362, it was held to be within the power of a Federal court to decree that the rates established by a state board of railroad commissioners are unreasonable and unjust and to restrain their enforcement, but that it has not within itself power to establish rates or to restrain the commission from again establishing rates. In the case of *Smythe vs. Ames*, 169 U. S. 466, it was held that an act of the legislature of Nebraska establishing maximum rates to be charged by railroad companies for the transportation of property, passed under express authority conferred by the constitution of that state, was unreasonable and, therefore, invalid. No matter how our early education and subsequent researches may have inclined us to the opinion that the reasonableness or unreasonableness of a law is a matter solely for the determination of law-making bodies, and one with which law-construing bodies have no concern, it is now finally and definitely determined, by the final arbiter of all governmental questions, that a law is a law if it concurs with the views of that court of what is reasonable, and that it is not a law if it does not so concur. The basis of fact from which this most remarkable result is evolved is equally as peculiar as the conclusion of the court. The court goes at much length into the evidence of supposed experts, varying widely in their estimates and statements, to determine the question whether the rates established afford the company a profit separately and of themselves, disconnecting the revenues derived from through business. The court says in effect that a reduction of  $29\frac{1}{2}$  per cent. on the receipts from local business must necessarily be ruinous notwithstanding the fact that the rates

charged are still far in excess of those charged on through business, and notwithstanding the fact that the local business amounts to but a small percentage of the whole traffic of the companies. It would be impractical for any one whose education in mathematics has not been carried higher than the integral calculus to attempt to follow the reasoning of the learned justice of the court who tried the case at circuit and of the justice who wrote the opinion for the Supreme Court, through all his differentiations and integrations by which he finally demonstrates to the satisfaction of the court that the reasoning faculties of the members of the Legislature of Nebraska were unreasonable, and the law they evolved in conflict with the 14th amendment of the Constitution of the United States, adopted for the protection of the freedmen in the South. Is it not indeed remarkable that a constitutional provision prompted by a desire to effectually guard the rights of the humblest, and recently most sorely oppressed, class of citizens should now be found an impregnable citadel within which corporate privileges, however oppressive to the multitude, may dwell in absolute safety from legislative attack and executive interference? Indeed, whose reason is reasonable? Where can be found the touchstone by which it may be surely determined whether the results of the operations of the mind are reasonable or unreasonable? Is it judges alone, and Federal judges at that, who are gifted with mental powers operating so unerringly that they alone may declare what rule as applied to the business affairs of corporations and of men is a reasonable rule? Naturally, the inferior Federal courts are prompt to assume every function which the construction placed on the constitution by the Supreme Court authorizes, and at the suit of men of wealth or of great corporations, they unhesitatingly, and even without investigation, restrain the officers of the States from executing their laws. The recent case of *Cotting vs. Kansas City Stock Yards Company*, 79 Fed. Rep. 679, and 82 Fed. 889 and 850, strongly illustrates, in one respect at least, the practice of the Federal courts. An act had been passed by the Legislature of Kansas prescribing the rates to be charged by stock yards companies. On the petition of a stockholder a temporary order was made restraining the stock yards company from obeying the law, and fixing the time for the hearing on the application for a temporary injunction. After a full hearing involving the merits of the case the temporary injunction was denied. The showing clearly proved that the reduced rates fixed by the law still yielded an inordinate profit on the capital invested; the restraining order, however, preventing the observance of the law was continued in force. On the final hearing of the case the validity of the law was still maintained, but the continued violation of it by the officers of the stock yards was commanded until after a final decision of the Supreme Court of the United States. Thus, by the mere force of the prevailing system of practice and the habits of a Federal court, the stock yards company is required to continue for years to violate a law of the State from which it obtained its charter and in which it transacts its business, which the court holds

to be a valid law, and which it is a crime for the officers of the company to disobey.

While the greatest aid to the moneyed classes has come through the nullification by the courts of State and Federal legislation, cases have arisen in which affirmative action was required to meet the particular exigency. It has accordingly become fashionable in recent years to issue sweeping injunctions, prescribing rules not differing in character from legislative enactments, for the government of the conduct of large numbers or individuals. This class of cases is well illustrated by the *Debs* case, 158 U. S. 564, reviewing on habeas corpus proceedings an order of the Circuit Court of the Northern District of Illinois, reported in 64 Fed. 724. On the application of the United States District Attorney, a sweeping injunction was issued against *Debs* and three others by name, "and all persons combining and conspiring with them and all other persons whatsoever," restraining them from committing any of a long catalogue of torts, trespasses and misdemeanors. *Debs*, being charged with a violation of this order, was denied the right of trial by jury and punished by the Federal judge, not for the violation of any law of the State of Illinois, but for a violation of the law promulgated by the judge in the form of an injunction.

It may be observed that most of the cases already discussed were in their original forms applications to a Federal court for an injunction. In order to fully understand the surprising growth under the practices of the Federal Court of that branch of their equitable powers which finds its practical application to the affairs of men through the medium of injunctions, it is only necessary to compare the recent cases with the earlier ones. In the reports of the cases decided during the last term of the Supreme Court, covering the period from October 9 to May 23, a working year as that court works, are to be found the following cases: *Smythe vs. Ames*, *supra.*, and two companion injunction cases brought to nullify the Nebraska freight rate law; *Magoun vs. The Illinois Trust and Savings Bank*, 170, U. S., 205, to enjoin the payment of an inheritance tax required by the laws of Illinois; *Vance vs. Vanderhook*, 170 U. S. 438, to enjoin the State officers of South Carolina from enforcing the State Dispensary law; *Kirwin vs. Murphy*, 170 U. S. 265, to restrain the Surveyor General from making a survey; *Ins. Co. vs. Austin*, 168 U. S. 685, to restrain the officers of the city of Austin, Texas, from taking water except from the plaintiff; four other cases of minor importance to restrain the collection of taxes, as well as others in which relief by injunction was asked as an incident. Let us compare this showing with that made during the earlier years of the court's history. From its organization in 1790 to 1805, covering the time of the administrations of Washington and Adams and Jefferson's first term, the only cases found reported in the books in which an injunction was the principal relief prayed for are the following: *State of Georgia vs. Brailsford*, 2 Dallas 415, an application for an injunction asked by the State to aid it in the collection of a debt; *State of New York vs. the*

State of Connecticut, 4 Dallas 1, to restrain the prosecution of ejectment suits for the recovery of land claimed by New York, and *Riley vs. Lamar*, 2 Cranch 200, to enjoin the collection of a judgment. The cases of *Grayson vs. Virginia*, 3 Dallas 320, and *Huger vs. South Carolina*, 3 Dallas 339, were bills in equity, but what relief was demanded does not appear from the report. Nor do the cases appear to have even been heard on the merits. They presented the question as to the right of the court to entertain jurisdiction of a case brought against a state, which was settled soon after by the adoption of the 11th amendment to the constitution then before the States for ratification. The only other case at all similar in character to the fashionable injunction suit of today is that of *Maybury v. Madison*, 1 Cranch 149, which was an application for a mandamus to compel the Secretary of State of the United States to deliver commissions to Justices of the Peace of the District of Columbia. While the question as to the power of the court to entertain jurisdiction of such an action was elaborately considered and maintained by the court the mandamus was refused, and would probably have been disregarded if issued. During this period cases were before the court presenting a great variety of most important questions. The framework of our government was new, but at that time it does not seem to have been conceived by the most astute lawyer that the courts possessed general supervisory powers over the actions of the executive and legislative departments of the government. As we have seen, an attempt to assert jurisdiction over the sovereign states was quickly rebuked, and the power to do so promptly denied by the people through the adoption of the eleventh amendment. Many nice questions under the law of Nations, growing out of the conditions of war throughout Europe and on the high seas, were passed on in numerous prize cases. Nearly every form of common law action came up for review, but appeals to equitable powers were rare. The people of that day were strongly attached to the principles of the common law and most jealous of the right of trial by jury. It seems to have been realized that chancery powers were emanations from the King, undefined and largely discretionary with the judges administering them; that the measure of justice in chancery depended, as has been sometimes said, on the length of the chancellor's foot, and the occasion for its exercise on the condition of his stomach. The growth of the jurisdiction exercised on the chancery side of the court accords with its aristocratic constitution and tendencies and is made at the expense of the principles of the common law. The old rule was that no resort could be had to a court of equity, and especially to a writ of injunction where there was an adequate remedy at common law. This rule seems to have become obsolete. It certainly is no longer observed. From the nature of such actions the court alone judges of the occasion for the employment of the writ of injunction. In an equitable action a jury can never be demanded as of right. The judge alone determines the limits of his own powers and the occasion for their exercise. So it has happened that step by step at first and at last by great strides and

bounds injunction has become the be-all and the end-all of controverted constitutional rights. Astute lawyers find no difficulty in inventing a case which shall present a question calling for the interposition of a court to shield strong suitors from the imposition of their fair share of the public burdens and from the effects of inimical legislation as well as from combinations of dependent laborers. The worst form which the exercise of this so-called equitable power takes is in the annulment of acts of Congress and of the State Legislatures by a single judge on an *ex parte* application for an injunction without consideration of the merits of the question, as was done in the stockyards case and is done habitually by Federal judges everywhere. Thus it happens that by a mere fiat of a Federal judge, appointed by some president long since relegated to private life, a law duly and deliberately passed by representatives of the people, chosen for that purpose, is nullified for the time at least without a hearing. Even more, by an order of injunction Federal and State officials are prohibited from obeying the law under penalty of punishment as for a contempt of court. So by a preliminary order of a single Federal judge, obedience to a law duly passed by those authorized to pass laws, is converted into a vague crime, punishable without trial by jury, at the mere will of a Federal judge. That this system is vicious in principle, contrary to the spirit of our free institutions, and disastrous in results, is too apparent to call for discussion. Through it any law obnoxious to a great corporation, or a wealthy suitor, is nullified during the pendency of the litigation and until the court of last resort declares it valid. It often happens, too, that the public is either not represented before the court or by indifferent counsel, and where the decision in the lower court is adverse to the law the great expense involved in taking a case to the Supreme Court prevents an appeal when no public funds are appropriated for that purpose. Certainly all presumptions should be in favor of the validity of a law duly passed rather than against it. No inferior court or judge should have the power to prohibit obedience to an act of Congress until the Supreme Court of the United States has, in an action at law, declared it to conflict with the constitution, nor should any district or circuit court or judge enjoin any person from obeying an act of a State Legislature until declared unconstitutional either by the highest court of the State or by the Supreme Court of the United States. This would still leave power in the courts of last resort to prevent law-making bodies from overriding the constitution. But it would also compel respect for Congress and the legislatures by inferior tribunals, and would give living force to the presumption that an act of Congress or of a legislature is a law to be obeyed.

If it be said that this review of the workings of the Supreme Court of the United States is partial and one-sided, where can a case be pointed to presenting a close question of constitutional construction of vital interest to the general public which has been resolved in favor of the democracy and against the aristocracy, in favor of the multitude of the poor and the weak

and against the class of the rich and the strong. It is true that, in the ordinary administration of justice between man and man, the decisions generally proceed on enlightened principles and are just applications of the law to the rights of the parties, but wherever a question has been presented, of vast importance to all the people, vitally affecting their welfare and in opposition to the claimed rights of the favored few, the aristocratic leanings of the court have tipped the balance on the wrong side. Can any one suggest cases which in his estimation, in any measurable degree, counterbalance the Dartmouth College case, the Dred Scott decision, the income tax case, the Interstate Commerce Commission cases or the Nebraska freight rate case? These cover in principle the main field of contention between those who seek for justice to the whole people and the favored few who lie entrenched behind special privilege and in the possession of unearned gains. The inequalities and injustices existing between the great multitude and the favored classes arise mainly from an unjust system of taxation and from corporate and other special privileges. Against all attacks on these the Federal courts stand as an impregnable bulwark. The income tax decision declares that no burdens may be cast on wealth. The interstate Commerce Commission cases and the Nebraska freight rate case in effect declare that railroad corporations are a law unto themselves and may levy tribute on all the internal commerce of the country at their own unbridled will and pleasure. The Debs and other similar cases hold that oppressed laborers who combine to right their own grievances, may be punished by a judge for the violation of a rule promulgated by himself at his own will and pleasure, without trial by jury. The recent cases holding certain associations and combinations unlawful under the Sherman anti-trust law may be pointed to as having an opposite tendency. No vital principle, however, of constitutional construction is declared. Nor is it by any means certain that unjust discriminations will not increase rather than diminish by reason of this decision. Its effects are at least problematical and of most uncertain value if, indeed, they lead in the right direction. The question may fairly be asked in all seriousness whether we still have in substance the same form of government as that administered by Washington, Adams, Jefferson and their early successors, and whether we still have three equal co-ordinate branches of government or a single sovereign power vested in the court of last resort.

How shall these evil tendencies be remedied? Congress clearly has a right to take away from the courts powers which they habitually abuse. The district and circuit courts of the United States might well be shorn of a large part if not of all their chancery jurisdiction. The need of a chancellor to devise remedies in cases not provided for by statute or the common law is far less now in the advanced state of the science of the law than in early times. Whether the courts would observe Congressional restrictions may be a matter of some doubt, but that the power resides in Congress to impose them cannot be questioned.



The cause of the evil tendencies having been ascertained, the remedy ought readily to be found. The cause, as we have seen, lies in the fact that the organization of the courts is out of harmony with the spirit of our institutions. The positions the judges occupy are anomalous. They alone of all the officials in the republic hold office by life tenure. They alone are removed from accountability to the people.

Of all the works of men the governments they construct are the most purely artificial. Nature furnishes no model. The theory most followed elsewhere has been that either an individual or a select number of persons can better make and execute laws for the multitude than they for themselves. The theory of our government is that the ultimate test of the wisdom of every law and governmental theory is to be found in the approval or disapproval of those for whom it is provided. The answer from this test can never come through a class or a number of select persons. It must come from the consensus of all. When there is not a general agreement, as a matter of convenience and for the time being the judgment of the majority is allowed to control. It will be found, however, on close inquiry that on substantially every question of really great importance which at one time or another has agitated the American public they, within the period of a generation, have been able to reach a substantial agreement. The theory of our government is that the people are the ultimate and absolute sovereigns. Is it not paradoxical to say that they are the sovereigns and may govern themselves as they will, yet that a court or any other instrument they may appoint may finally and effectually defeat their will? Has not the Supreme Court of the United States as now constituted this power, and has it not exercised it? It determines every question arising under the constitution and laws of the United States. It is the sole judge of its own powers. Though it derives its powers immediately from the people it is not accountable to them for any error of judgment. Theoretically it cannot err, for it alone is authorized to determine what is truth and what error. Impeachment and removal from office could never safely be resorted to except in case of official corruption or gross misconduct. It would be manifestly unwise to attempt a review of the soundness of a decision of a court on a trial of impeachment against a judge.

The evils of life tenure of office are at a minimum where the jurisdiction is confined to a small territory containing few people. They increase with the magnitude of the district in which the functions are exercised.

The actions of the states separately, in framing and amending their constitutions from time to time, clearly point out the remedy for the evils we have been considering, as well as indicate the general consensus of opinion among the people of all political parties and in all sections of the country, as to the desirability of the continuance of judges in office for life.

When the constitution was adopted by the provisions of the constitutions of the states the judges of their courts of last resort held office during good

behavior in the following states: Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, North Carolina, South Carolina, Virginia and practically so in Rhode Island. In Georgia the term was three years. In New Jersey and Pennsylvania seven years. By the constitutions of newly admitted states in the early history of the country the judges held tenure during good behavior, as follows: Alabama (constitution of 1819), Florida (1838), Illinois (1818), Kentucky (1792), Maine (1820), Mississippi (1817), Missouri (1820), Tennessee (1796). Under the constitution of 1790 the judges of Pennsylvania were also given life tenure. By new constitutions, or amendments to the old, all of these states have reduced the tenure to a term of years except Delaware, Florida, Massachusetts and New Hampshire. The provisions of the constitution of Rhode Island, adopted in 1842, are peculiar. Their judges are elected by the general assembly and hold office until removed by vote of a majority of each house. The constitutions of the new states have all provided that the judges of their courts of last resort shall hold for terms of years, and for the election of judges by the people. Under the earlier constitutions the rule was that the judges were either appointed by the Governor or by the Legislature. The tendency has been toward shorter terms and popular election. Of the states which still adhere to the system of life tenure Massachusetts is still governed by the constitution of 1780. New Hampshire by that of 1792, Delaware of 1831 and Rhode Island of 1842. The constitution of Florida of 1868 is the only one of comparatively recent date under which the judges hold office for life. It will be observed that with the exception of Florida these states are the very smallest in the Union, the combined area of New Hampshire, Massachusetts, Rhode Island and Delaware being but 20,090 square miles, a little less than one-fourth of the area of Kansas. The shortest term in any state is two years, in Vermont. Next comes Ohio with five years. In Alabama, Idaho, Indiana, Iowa, Kansas, Nebraska, Nevada, Oregon, South Carolina, Texas, Wisconsin, Montana, North Dakota, South Dakota, Utah and Washington the term is six years. In Maine, Minnesota and New Jersey seven years. In Arkansas, Connecticut, Kentucky, Louisiana, Michigan, South Carolina, Tennessee and Wyoming eight years. In Colorado, Illinois and Mississippi nine years. In California and Missouri ten years. In Georgia, Virginia and West Virginia twelve years.\* In New York fourteen years. In Maryland fifteen years, and in Pennsylvania twenty-one years. The average term in those states where it is limited to a period of years is eight and one-fortieth years. These

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\*NOTE. In Georgia under the constitution of 1868 the judges were appointed by the Governor and confirmed by the Senate for terms of twelve years. In 1895 the Legislature submitted an amendment to the constitution reducing the terms to six years and providing for the election of the judges by vote of the people. This amendment was ratified by the people in 1896, and is now the law of that State. The change was not brought to my attention at the time the address was delivered.

terms are fixed for the judges of the courts of last resort. The terms of the judges of inferior courts are usually shorter. Under all of the new constitutions the judges are elected by vote of the people. It is only in the older states and under old constitutions that they are appointed or elected by the Legislature. Life tenure is only retained where it is least likely to work unjustly owing to the close contact with the people to which the judges are necessarily subjected, because of the smallness of the territory over which their jurisdiction extends. At present in five states the judges are chosen by the Legislature. In nine they are appointed by the Governor and confirmed by the Senate in eight of these. In thirty-one they are elected by the people.

From this it appears that there is a general and substantially unanimous consensus of opinion among the people of the states on the two fundamental propositions, that the judges should hold for fixed terms and that they should be elected by the people. There are instances of changes from shorter terms to longer ones. In Vermont from one year to two. In California from six years to ten. In Georgia from three years to twelve. In New York from eight years to fourteen. On the whole, public sentiment seems to incline against very frequent changes, and the arrangement with reference to the election of the judges in substantially all of the newer states, and most of the older ones as well, is to elect a part only at one time, so that courts shall at all times be composed of a majority of old members. In view of the vast country over which the jurisdiction of the Supreme Court of the United States extends, and of the peculiar influences to which the judges of that court are subjected, a term of six years would seem to be quite as long as is desirable. To avoid sectional influences it might be well that they should be elected by districts, three at each election of members of the House of Representatives. United States district judges might be elected by the people of their districts and circuit judges by the people of the circuit for four or six years, as might be deemed best. This would afford the people an opportunity to exercise their ultimate and absolute sovereignty by removing from office judges whose course does not please them, without assigning any reason for so doing and merely because it is their will and pleasure. The only objections that can be urged against this system are the objections urged against popular government. There is nothing in the history of the republic indicating that the people are less capable to select their judges than they are to select executive and legislative officers. The courts of last resort in the states have been filled by men possessing all the desirable qualities and qualifications for the discharge of their duties that have been possessed by Federal judges, and far less friction and irritation has resulted from their acts than from those of the Federal courts. No more unjust charge could be made against the people of the United States than that they desire any of their courts to depart from the strict path of duty, or to warp or pervert the law in any particular. On the contrary, one of the most marked and cheer-

ing characteristics of American civilization is the delight the whole people take in a complete system of just laws, honestly, intelligently and impartially administered. The mutterings of discontent that sometimes grow and deepen are prompted solely by the fear that the judicial ermine may be polluted. Let the people again take to themselves the full and absolute sovereignty which is their right and the Federal courts will cease to be looked upon with eyes of jealousy and as a thing foreign and unsuited to a republic.

## **The Judge, the Lawyer and the Citizen.**

BY GEORGE E. PECK.

It has often been said that home is the sweetest word in our language. Only those who have been banished can know how true the saying is, or appreciate how much more it means than it seems to mean. Since I left this State, six years ago, I have known some joys and many sorrows, but there has never been a moment when Kansas was not the dearest spot on earth to me. Here are the old friends and the true friends; here were the small beginnings of my professional life, and here the children played in the days when we were all happy together. Your welcome has touched me deeply, for it gives me assurance that even yet, prodigal sons may return and claim kindred with those who have kept the homestead. The old theological doctrine, "once in grace always in grace" may or may not be true, but "once a Kansan always a Kansan" finds a sure response in the hearts of all who have ever breathed the air of this great commonwealth. I salute you as a loyal son, and joyfully greet the neighbors, companions and friends of other days.

It is not in my nature to attempt a formal address on such an occasion. It is too much one of personal happiness to permit me to care for the themes usually considered appropriate at your yearly meetings. I am thinking more of the past than of the present. But being under promise to address you, I must needs go forward as best I may, appealing to your charitable consideration if I wander somewhat from the subject. It was chosen after painful deliberation—painful deliberation, which Carlyle defines as "irresolution and imbecility wrestling with each other," and I flatter myself that it is rather a happy selection, for plainly it is one of great latitude and great longitude. "The Judge, the Lawyer and the Citizen" comprehend the entire body politic, excepting

only a few unnaturalized foreigners, Chinamen and Indians not taxed. It is so great a theme that I can only hover around its edges, making here and there a suggestion which, after all, may not be pertinent. Sometime ago I received an intimation that you did not desire a profound and learned discourse; and then I knew why you invited me. As our great Senator Lane used to say, "Gentlemen, I thank you for this evidence of your confidence."

After all, what difference does it make what the text is, or whether one sticks very closely to it? If the spirit of good will is in our hearts, and if tonight we are called to a renewed faith in the ideals of our profession, our meeting will not be a waste of time. It is not for me to give advice as to the ethical duties that rest upon judges and lawyers. The things that make for righteousness cannot be tabulated and set down by fixed rules, and if they could, who would dare strike the balance of his own account? Men are such little creatures when viewed in their relation to the world's history—the great sweep of things from the beginning of beginnings—that it seems almost impossible to name any duty or any responsibility in a fixed and determinate way. As the courts sometimes remark when they can think of nothing else to say, "We must consider the circumstances."

The standards of human conduct have so many limitations, so many modifications, so many exceptions, that we may be forgiven if the task of laying down absolute rules is beyond our capacity. And yet in some way, by some infinitely large evolution, social order has been attained, and in what we call civilization men have come to put limits upon their native instincts and bridles upon their own unguided impulses. This is law; the great uplifting force which has gradually transformed mere savagery into the high conception we now have of mutual rights, the understanding that peace and not war is the true relation of men with men in their daily lives. I consider it the strangest thing in all the phenomena of human growth, that the ungoverned wildness of animal nature should have voluntarily put a yoke upon itself, and from century to century grow more submissive to its weight. The idea of authority which was so hard for primeval man to grasp, has almost become a part of our natures, and we recognize it not as a surrender of our liberties, but as their surest guaranty. The family, the clan, the tribe are steps toward that highest form of organization, the institutional government, under which individual liberty finds its truest safeguard. The race has gone forward by putting upon itself the restraint of laws, and only by so doing has there been what we call progress. And this, gentlemen, is the glory of our profession, that it has helped the onward movement; helped to hold the ranks together under the sway of rules, not always very clearly specified and not always, perhaps, the wisest or the best, but after their fashion establishing the sanctions of human conduct in communities, states and nations. The judges and lawyers who compose this Association stand for something more than mere numbers in the affairs of the state, for they exercise and have always exercised a wider influence than that of any other equal number of

men. No one can deny that their influence has generally been wisely and usefully directed.

In the United States more than anywhere else, the bar is potential in political affairs. Our system of government which makes the judiciary a distinct, independent, or to use the familiar word "co-ordinate" branch, differs so much from the system of most European countries that it is still considered by many of their writers as a doubtful experiment. As lawyers are officers of the courts in which they practice, they are in a certain sense a part of the government, a part of the mechanism by which laws are enforced and the rights and duties of citizens asserted. I fear they are not always very sensibly impressed with this great fact, but they ought never to forget it, for in the administration of justice, the office of attorney is second only in importance to the office of judge. You may lay down any other position and take up that of the practicing lawyer with no sacrifice of dignity. Grover Cleveland and Benjamin Harrison have both appeared as lawyers and argued causes before the Supreme Court, when there were judges on that bench whom they, as Presidents, had appointed. When someone joked Mr. Harrison about it, he said he had been promoted from the second to the first office in the United States.

I find myself talking about the lawyer instead of the judge, when a due respect requires that the latter should have the leading place. I have often wondered how a man feels when he becomes a judge, when he thinks of the great powers he is to wield, and the awful responsibilities that must rest upon him while he sits in judgment. If perfection is required anywhere, it is in the judicial office, and yet, the judge is only human, and when off the bench he may, I dare say, be subject to human imperfections—though I cannot positively so affirm. In speaking of judges and lawyers as distinct classes, I would not have you suppose that judges are not, themselves, lawyers, for frequently they are; but the judge's point of view and the lawyer's point of view are quite different. The lawyer plays for victory; the judge, if he be worthy the name, is seeking only to do justice between man and man according to the law. The judge is not the court until he takes his seat upon the bench, and then he becomes impersonally the voice and organ of justice, the majestic embodiment of the law. Among the traditions of our profession, none is more sacred than respect for the court, the deferential attitude which lawyers always maintain toward the bench, and it is a happy thing that it is generally deserved. I have heard it said that judges enjoy the adulation they receive from lawyers when causes are on trial, for incense is ever sweet to the nostrils even of great men. Shakespeare never touched a profounder depth of human nature than when, in the memorable meeting of those who were to do the deed for Julius Cæsar, he makes Decius declare to Cassius, Casca and their fellow conspirators, that men may be betrayed by flatterers, and adds:

"But when I tell him he hates flatterers,  
He says he does—being then most flattered."

When lawyers speak of their entire confidence in the learning, the wisdom and the sense of justice resting in the bosom of the court, they mean it all, but, alas! the decision sometimes shocks their faith and shows how confidence may be misplaced. We say "Your Honor" from force of habit, but it is perfectly true that generally speaking the bench is governed by a high sense of honor, and we could not give judges a more fitting title. It is, however, an open secret among lawyers that the infallibility of judges is only *prima facie*. Our system of appeals recognizes and presupposes the possibility of error, until you get to the court of last resort, where wisdom sits enthroned. Of course, even the highest courts are sometimes wrong—they have often been wrong in my cases—but litigation must end somewhere, and so after we get over our disappointment we submit, only wishing there were another court to which we might go. Ah! it is that other court, that invisible court which does not exist, that would make everything right and give us the victories we deserve.

I thought when I was invited to come here, that knowing the wrongs and grievances which we, of the bar, have suffered, I would gently touch upon some things we cannot speak of in court. Here, as I understand it, we are all on terms of equality. Judges cannot assume lofty airs over us who are not anointed—until they take their seats on the bench tomorrow. I am coming to a tender point in the relation of bench and bar, namely, the mutual courtesy due from each to the other. We know, for it has been ingrained in our education, the respect due from the bar to the bench. But who has ever told judges that they, too, owe something to the men who present causes and interests which are infinitely important to those who are before the court?

The administration of justice, which is a solemn function of government, should be carried on in a decent and decorous way. When a lawyer is not respectful to the court, he commits a grave breach of good manners, but when a judge takes advantage of his position to insult and humiliate a lawyer, he shows how unfit he is to sit upon the bench. In nearly thirty years of active practice, I am bound to say that I have seen many more inexcusable exhibitions of bad temper on the bench than at the bar. I beg you not to think that I am making any complaint of judicial manners, but yet, we all know there can be no fair combat between lawyer and judge. The lawyer must yield because the judge has the last argument, which is the sheriff's lock and key. A small judge has a tremendous advantage over a large lawyer, and sometimes he delights to avail himself of it.

After all is said about respect for the judicial office, and (which is an entirely different thing) for the person who fills it, it should not be forgotten that the bar is in intellect and in knowledge, greatly superior to the bench; because, as Uncle Chester Thomas used to say, "there are more on 'em." The bench is taken from the bar, and the judges were once the same ordinary kind of people that



we are. Oftentimes they go back to the bar after serving their terms on the bench, and then they know how much more difficult it is to be a good lawyer than it is to be a good judge. The greatest living American judge is a Kansan—David J. Brewer. He is to the bench of today what John Marshall was in the early years of the century; the original thinker, the expounder of principles on lines of natural reason and inherent common sense. We all know him as a judge and love him as a man. His manners on the bench, like his manners off the bench, are the natural outgrowth of a good, kind and generous heart. Once after a very dry and tedious argument in a patent case, he came down from the bench, and meeting a friend who was of the legal profession, told of a remark whispered by the judge who sat next to him while the dry and tedious lawyer was making his argument, and added: "Ah! if you lawyers only knew what we judges are saying about you while you talk, you would not be so airy." And the lawyer promptly replied, "If you judges knew what we lawyers are saying about you, you would not be so airy." The truth is, bench and bar are together ministers of justice; each has its duties and responsibilities, and each should remember what is due to the other. The highest office in this country is that of judge, because he wields a power compared with which that of Governor or President is small and trivial. I once heard Jeremiah S. Black say, that the only man in the world who can dispute authority with the Almighty, is a Judge of the Court of Common Pleas in Pennsylvania. A judge of the District Court in this State has powers which might well appal a man when considering whether he would accept them. Daniel Webster declared in a memorable speech that "justice is the great interest of man on earth." Indeed, it must be so, for the noblest human aspirations only point to that high state of which men have dreamed, where laws are just and equal, neither exalting the rich nor depressing the poor, but are uniform and regular as the stars in their courses.

I have not yet said all that I should about the judge, but I pass to the lawyer. The lawyer is an incipient judge. The pathway of the legal profession is strewn with great judges who perished before they were discovered. There is something pathetic, as well as joyous, in the career of the average lawyer whose fate, as was said by a great member of our profession, is "to work hard, live well and die poor." All men make mistakes occasionally, and the greatest mistake some lawyers make is that of ever trying to be lawyers. Some of us should have been doctors, some should have been poets, some clergymen, and some, though few, should have been business men. How shall a young man without experience, knowing little of the world or of the ways of the world, determine his true vocation? It must largely be a guess, a mere venture in the lottery of life.

"How sweet an Ovid was in Murray lost" is true of many besides the great Lord Mansfield. One of our pleasing delusions is that it takes exceptionally great ability to be a lawyer. Our own experience, however, demonstrates that it does not. It is undoubtedly true that professional success requires a logical

mind, good judgment, common sense and a reasonable amount of learning. But a very ordinary man may have all these. Combine Matthew Hale and Lord Eldon and they are nothing when weighed against Shakespeare or Milton or Wordsworth or Tennyson. All our famous American lawyers will be forgotten while men continue to quote the sweet wise sayings of Emerson. It may be heresy on such an occasion, but it is my deliberate opinion that it takes more ability to be a successful merchant or manufacturer, than it does to be a successful lawyer. So far as money goes, the rewards of a business career are, of course, for greater than of success at the law. But happiness comes to us as it cannot come to any other class of men. We are soldiers, and know the joy of battle. True, business men fight after a fashion in the fierce struggles of competition, but we have it hand to hand in the presence of the arbiter, and in the presence of deeply interested spectators. It is sometimes said of us that we are mere mercenaries, waging war for the side that retains us. Well, that is to a certain extent true, but justice is not a one-sided affair. Heaven forbid that we should ever see the day when only the admittedly right side may be defended. The prisoner at the bar is legally, yes, and morally entitled to a fair hearing. What we call the welfare of society is undoubtedly a high interest to be conserved, but the welfare of society cannot be attained by taking from any man the safeguards of life and liberty that every other man enjoys. Any system of justice which does not insure that, is simply the system of a mob. It is not good taste for lawyers to boast overmuch, but it is my opinion that we may safely compare our ethical code with that of any other class of men. We doubtless make some lapses from the straight line of good conduct, but so do all. On the stage and in works of fiction, lawyers are generally represented as cunning, vulgar fellows, thinking of nothing but their own interests. "Dodson and Fogg" is a well-known firm, and "Quirk, Gammon and Snap" are famous wherever a good novel is enjoyed. But I appeal to the lawyers here present, did you ever do anything so unscrupulous as to be reprimanded by your client? Did he ever chide you for sharp practices, or refuse to accept the verdict you secured for him? The fact is, lawyers are not half so sharp, not half so cunning, not half so unscrupulous as their clients would sometimes be glad to have them. I believe I may fairly say of every lawyer in this Association, that he has often had occasion to rebuke his client and has often refused to take a course of action which his client professed to consider entirely proper. This is not saying that clients are habitually dishonest, because we all know there are no dishonest clients. It is simply speaking the truth, which is that lawyers by their training, by their experience, by their oath of office, and by all the traditions of the profession are bound to be honorable men. The legal profession has here and there a member who does not adorn it, but are all bankers honest? Do merchants never deceive? Do doctors always take what they would give? Literature is filled with jokes at our expense. When the grave digger throws up a skull, Hamlet cries out: "There's another! Why might not that be the skull

of a lawyer? Where be his quiddits now, his quillets, his cases, his tenures and his tricks?" I wonder if really there are tricks in our trade? There is a broad hint to that effect in Chaucer, when he assembles the Canterbury pilgrims at the Tabard Inn, the merchant, the haberdasher, the dyer and the rest, including the lawyer, of whom he says:

"No-where so busy a man as he there n'as  
And yet, he seemed busier than he was."

Perhaps something of that little professional weakness still lingers with us, for I have known even here lawyers make more or less show of business that was principally show. Most of my professional life was passed in Kansas. I know the lawyers of this State as I shall never know them anywhere else, and I assert that as a class, they are as high-minded, self-respecting and honorable a body of men as you will find if you search the world over.

The lawyer in this country and in all constitutional countries is, as a rule, a respectable gentleman, doing his duty conscientiously according to his understanding, holding office sometimes, but usually walking the beaten path of obscurity. He is the monitor by which many people are directed, the light by which many feet are guided. His duties are often of a humble character, for he prepares leases, deeds and contracts, draws wills, and in the darkest hours gives a certain non-priestly consolation to stricken souls. He is often the repository of the secrets of an entire neighborhood and he bears them loyally as becomes a man of honor.

I have said something of judges and lawyers in respect to their official and professional duties; but all Americans have duties not dependent upon office or profession. What patriotism is, need not now be discussed, but those who have not felt its influence are not such citizens as make good lawyers or good judges. There is a school of political thinkers who teach that bench and bar, being devoted only to the administration of justice, should consign themselves to a rigid seclusion from the things that interest other men. I do not think so. We are not anchorites, cloistered priests, forbidden to mingle in worldly affairs. On the contrary because of our calling we are bound to lead, or, at least, to follow closely after the lead.

"Noblesse oblige" is a maxim running back to mediæval times, but it is now and always a solemn present admonition to us. We have no right to call ourselves "learned in the law" if we are not prepared to vindicate that distinction. If we have studied the institutions of our country; if we profess to know something of its polity and its organic law; if we offer to represent its citizens when their rights are at stake, we cannot excuse ourselves if we are indifferent to its welfare, its honor and to the record it shall make in history. It is said of lawyers that they are naturally conservative, and our profession could not have higher praise. There are so many in these hurrying times who rush blindly on, that we can afford to be classed with those who would not willingly give up the old and tried.

Speaking in broad terms, innovation is undoubtedly the law of progress. We cannot go forward by maintaining the same old standing place. But change means simply a shifting of position, and we should remember that not every change of position is forward. In our political history we have what we call landmarks; in our legal history we have precedents. Who would willingly strike them down? Courts follow decisions under the maxim *stare decisis*, simply because they are decisions, because rights have grown up under them, and because certainty is better in judicature than absolute correctness in the first decision. As Emerson says of innovation and conservatism "each is a good half, but an impossible whole." We cannot recklessly uproot established rules, nor stupidly insist that they must last forever. Good government is not attained by leaps and bounds. Speaking only my personal views, I welcome every forward movement, every experiment that has the promise of better things for all the people. But not all who offer to lead have any idea, even the crudest, of causes that really demand leadership. Washington was a stumbling-block once, and Lincoln an impediment to the plans of those who could not wait.

We have been making history very rapidly in this last year. A foreign war summoned us to action, and the nation responded. Something we have learned that we did not certainly know before. We have learned that "the cankers of a calm world and a long peace" had not sapped our vigor nor made us a race of mere money-getters. We have learned that there is always an undecorated knighthood, wearing no insignia, belonging to no order, but moving forward steadily under consecrations not always visible, but as Wordsworth profoundly sang:

"Felt in the blood, and felt along the heart."

All our law-suits are insignificant compared with the issue which Dewey tried when he sailed into the bay. In that sublime hour he demanded and obtained judgment for centuries of wrong. While we go on with our small contentions, he is there yet, keeping the flag on the top-most mast, and asserting by day and by night, that the United States is in the Orient because it has a right to be.

Gentlemen, we are lawyers by choice, but citizens by birth. The judge may retire from the bench, the lawyer may retire from his practice, but the citizen is mustered in for life. The object of this Association is to advance the welfare of the legal profession, to bring the judges and lawyers of the state into pleasant social relations and to discuss, from time to time, questions which interest us in our professional capacities. But "the gladsome light of jurisprudence" can never be so sweet an influence as the light of patriotic impulses, stimulated by an intelligent conception of the duties of citizenship. The lawyer and the judge have taken an oath to be true to their respective callings, but the citizen is under an immemorial obligation. It comes with him into the world, and broods over him until he says his last

farewell. It is a sentiment, in part, with the sweet subtle influence of a mere emotion, but its truest basis is the mandate of the law. The highest patriotism has ever been obedience to the commands of legitimate authority, for authority is legitimate until it has passed the bounds of reason and endurance, and then revolution stalks to the front. When the things that are Cæsar's crowd too hard upon the things that are God's, the tribute must go to the higher power. But progress, enlightenment and freedom, of which we talk so much, move slowly, taking their time in a calm and self-contained way as sane ideas always have since the world began.

Did you ever consider the fact that most of the great struggles of history, and particularly of Anglo-Saxon history, have been over ancient rights and privileges instead of new demands? Such was Magna Charta; such was the great Bill of Rights; and such was the lofty enumeration of principles in our own Declaration of Independence. Gentlemen, our danger is not that we may fail to secure guaranties for newly discovered liberties: The real problem is, how shall we best hold those we have believed to be ours by the prescriptive tenure and birthright of American citizens? Before all other men, the lawyer should stand for the orderly movement of events; the even flow of that great current in which history moves, to consummations better than were dreamed of when the race was in its dawn. There was once a deadly struggle in a narrow pass, between a little band of Greeks and a horde of Asiatic invaders. On the monument to those who died at Thermopylæ, the poet Simonides wrote those lines which will be classic forever:

"Go, traveller, and tell in Lacedæmon that we who lie here died in obedience to her laws."

And so, Americans died for the laws of the United States at Gettysburg and followed the flag of the Republic through weary hours to the crowning mercy of Appomattox. It was not a wild unregulated impulse that took our volunteers to San Juan and Santiago. They had heard the deliberate pronouncement of a great nation, and they were there,—Spartans of this late day—in obedience to the laws. It is our mission as lawyers, to do something more than try cases. The highest fee we can ever receive, is the reward that is not measured in money, but which must always appear in the account that conscience keeps with itself. We are citizens, and better citizens I hope, than we are lawyers or judges, for the duties of citizenship are greater than any other that can come to us. I believe implicitly in a strong virile patriotism that overrides every distinction of class or profession, and makes us all bow to the majesty of the United States.

Kansas, patriotic as she always is, gave her brave sons to the cause, and is now following them with loving solicitude to the uttermost parts of the earth. Some of us are doubtful as to the policy called expansion, but who in the light of existing conditions, will declare for contraction? True statesmanship does not wring its hands over what might have been, but resolutely

grapples the problem that is imminent. We might well hesitate before hoisting the flag, but the solemn question is, in the language of our President: "Who will haul it down?" The future must be content; but if I were William McKinley I should keep what the army and navy have won, until the time comes, as it will, to take the deliberate judgment of the American people. The question is theirs, and does not belong to any man or to any party.

But while great policies of government are being decided, we shall be going on with our law-suits, vindicating rights and redressing wrongs. Damages, injunctions and foreclosures will have their day, and as individuals, we, too, shall have our day, but The Judge, the Lawyer and the Citizen will be needed—always.

## **The Kansas Courts of Appeals.**

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BY T. F. GARYER.

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It is now nearly four years that the Kansas Courts of Appeals have been at work. They were created to meet an emergency which called for immediate and decided relief from the accumulation of cases, and consequent long delays of hearings, in the Supreme Court. The law creating these new courts gave to them only a short span of life. They were given to the people of the State as a makeshift, or mere temporary necessity, with express notice that if endured for six years, the second Monday of January, 1901, should entomb them.

When, therefore, the Executive Council, selected this as one of the subjects for consideration at this meeting, and requested me to prepare a paper on it, a live, practical subject was furnished to me; one in which every lawyer is deeply interested, and which, at this time, demands attention serious enough to lead to fruitful action.

Let us then, briefly, look at what these courts have done, how their work has been received, and what will be the probable situation when the term for which they were created shall have expired. Such an examination will probably disclose the fact that mere temporary expedients of this kind do not meet the wants of the State, and may impress upon our minds the importance and present necessity for further provision by the legislature, now in session, for such a revision and change in our judicial system as will give to the people of the State one that shall be permanent and sufficient for their needs.

When the Courts of Appeals were created, in February, 1895, there were

pending in the Supreme Court over 2,200 cases; as many as could have been heard in six years. For years, the judges of that court had been doing an amount of work that was an unreasonable tax upon human capacity and endurance. More cases were decided, and more opinions written, in a year than should be required of a Supreme Court of five judges. But the bar is to be congratulated upon the fact, that this superabundance of work was not done at the sacrifice of careful consideration of cases. The high standard of the opinions of the Court was maintained during all those years.

Of the 2,200 and more cases so pending in the Supreme Court in February, 1895, 1,586 were certified to the several divisions of the Courts of Appeals, leaving nearly 700 cases still pending in the former court. Since then, over 1,100 new cases have been filed in the Supreme Court. In the same time, there have been nearly 1,600 cases disposed of. There are now about 200 cases remaining for hearing on the dockets of that court, 232 new cases were filed in 1898, and, in addition, 79 cases, on petitions for orders to certify from the Courts of Appeals, which were denied.

Of the cases certified from the Supreme Court to the Courts of Appeals, 634 went to the Northern Department and 952 to the Southern.

In the Northern Department, 680 new cases have been filed since March 1, 1895, as follows: Eastern Division, 360; Central Division, 160; Western Division, 60; making the total number of cases certified to, and originally filed in, the Northern Department, about 1,214. Of these, 1,021 have been disposed of, leaving now pending in the three divisions of that department about 193 cases, and new cases being filed at the rate of about 175 per year, distributed in this way:

Eastern Division, 113.

Central Division, 45.

Western Division, 15.

In the Southern Department, 775 original cases have been filed since March 1, 1895, as follows:

Eastern Division, 240.

Central Division, 410.

Western Division, 125.

The whole number certified to, and filed as original cases in, the Southern Department is 1,727. The total number of cases disposed of in that Department since the organization of the court is 1,081, there remaining undisposed of about 589 cases, and new cases being filed at the rate of about 200 per year. In 1898 there were filed:

In Eastern Division, 68.

In Central Division, 94.

In Western Division, 26.

The figures I have given may not be exact, but they do not vary materially from the actual facts on January 1, 1899, as ascertained from the several clerks of these courts, and show with sufficient accuracy for our purposes, the



work of these courts during the past four years, and the present situation.

It will thus be seen that the Supreme Court and the two Courts of Appeals have, in the last four years, disposed of over 3,600 cases, out of a total of nearly 4,700 pending therein during that time, leaving still pending upwards of 1,000 cases. Over 600 cases are being filed per year in the Supreme Court and in the Courts of Appeals. At the present rate of disposing of them, by 1901, when the inferior appellate courts have run their time, there will remain on the dockets at least 500 cases, which would necessarily all have to be heard by the Supreme Court. That court would, therefore, at once find an accumulation of work before it which would leave it, in January, 1901, nearly two years in arrears of what it should be, with over 600 new cases each year to swell the dockets. It is evident, therefore, that the existing provisions for the future are not adequate. Something must be done, or we will very soon be in the same unfortunate situation we were in in 1895. What shall it be?

The Courts of Appeals have done and are doing a good work. The judges are industrious and painstaking, so far as their opportunities permit. But, I believe I voice the views of nine-tenths of the lawyers of the State who practice in the higher courts, when I say this is not what we want as a permanent judicial system.

When it was proposed to devise a legislative scheme for the relief of the Supreme Court, personal and local influences at once thrust themselves to the front, securing the passage of an act which was not, in some respects, what it should have been. To get support for the bill, localities had to be placated by requiring the courts to sit in three different places in each department, making three divisions with a judge for each division. It would have been much better, in my judgment, to have provided for the sitting of the court at but one place in each; such place to be selected with reference to its accessibility and the advantages it could furnish the judges and lawyers.

The judges of these courts are required to hold three terms of court a year in each division, travelling from one end of the state to the other, without any provision for expenses, on the meager annual salary of \$2,500. As a consequence, each term lasts from two to five days, in the hurried hearing of oral arguments, and then, as a rule, the judges return to their several homes, each one to consider specially the cases assigned to him, and perhaps to make some general examination of other cases submitted. However much the individual judges may realize the importance of frequent consultations and a constant intermingling of work until a final decision in each case is arrived at and the opinions are to be prepared, the necessities of their situation deprive them of it. As a consequence, it is too often the case—for it never should be so—that a decision really represents the study and intelligent judgment of only one man. I am glad to say that I believe the present judges are earnestly trying to avoid this, and that to a considerable degree they succeed. They do this in spite of the conditions surrounding them, and

not because there is anything conducive to it in the statute.

The statistics of these courts must, also, satisfy every one that there is no longer any reason or necessity, if any ever did exist, for thus wheeling the judges around into the different corners of the State. It is a useless waste of time, labor and money. There are six clerks, six bailiffs, and other expenses connected with the different court divisions, all of which could be cut down two-thirds, and better results be secured.

If an appellate court, inferior to the Supreme Court, is to be continued, would it not be a much better plan to have one court consisting of five judges, to be elected from the state at large, the sittings of the court to be at the State Capital. Such a tribunal could, no doubt, dispose of all cases brought into it, if it had no greater jurisdiction than that now given the Courts of Appeals. The term of office of the judges should be at least six years, and the salary \$8,000. The opportunities afforded such a court for careful and thorough examination of cases would be superior, and the increase of the number of the judges would give a character and weight to its decisions which the decisions of Courts of Appeals organized on the present plan cannot have.

No one, probably, will care to suggest a return to the court commissioners. Notwithstanding those who acted in that capacity, while the Commissioner law was in force, were eminent lawyers, the system was discarded as not what we wanted. It is not likely any return will soon be made to it.

To give the best satisfaction, and, therefore, to be most desired, an appellate court should be one whose decisions are *final*. It should in truth be a court of *last resort*. We may think—quite loudly, too, at times—that the conclusions arrived at by the Supreme Court are altogether wrong. But when a higher tribunal does not confirm our beliefs by deliberately saying its decisions are wrong, we do not quite lose faith, and finally end the controversy by a full, even if not a wholly voluntary, acquiescence in the infallibility of its judgments. The trouble with intermediate court opinions is, that one is never sure that they will stand the supreme test when it is applied to them. It is very discouraging to the hopeful lawyer, when he cites a case in 5 Kan. App., for instance, and eloquently reads some well written, and supposedly learned, opinion, right in point, to have opposing council unfeelingly take down 58 Kan. and read therefrom a decision of the Supreme Court holding that what the Court of Appeals put forth as law is not law at all; or, if it ought to be the law, that it could not be given such recognition because of some unfortunate precedent found in the books. Any one who has made much use of the reports of the various courts in the State of New York knows what this means, even if he has had no such experience nearer home. There is a mighty advantage in being able to make mistakes without being found out. All courts of last resort have this advantage; and in that lies much of their prestige and strength.

There should not be, in a permanent system, an appellate court between the district courts and the Supreme Court, in this State. It is not desirable

from an economical standpoint; much less is it so when judged by results obtained. Of course, such courts may be an unavoidable necessity; as when the Supreme Court already has such a number of judges that an increased number could not work to advantage, or when there is no practical way to get relief through the Supreme Court.

In this State, the way is clear and the end easily attained, so that we shall have all necessary means to transact the business of the people. The constitution limits the number of the judges of the Supreme Court to three. This should be changed by an amendment so as to increase the number to seven. I do not believe an increase to five is sufficient. Certainly they could not, for any length of time, keep up with the business of the court. Seven could; six might. With that number, the judges could, when the press of business required it, divide into two sections for the hearing and deciding of cases. This would enable them to dispose of double the number of cases that can now be disposed of by that court; and, when unnecessary to work in sections, there would be a tribunal capable of giving to each case the most careful consideration, and doing the work that falls upon that court in the best manner. For years, the judges of the Supreme Court have been working with the energy of battleship engines under a full head of steam, giving to the people of the State three times as much service as is paid for.

A court of last resort should not be working under a constant great pressure of business. The State can well afford to provide the very best opportunities for its highest judicial tribunal, to the end that no decision need be made except after the most careful and exhaustive consideration, and that no litigant may, by unseemly delays, be deprived of that protection, under the laws, to which every citizen is entitled.

If the cost is to be taken into consideration, it is easily shown to be in favor of the increase of the number of the Supreme Court judges. An addition of four judges, with the present salaries, would require an increase of the appropriations for salaries of the judges of that court of \$12,000 per year; and that would be practically the only added expense. We are now paying \$15,000 per year for salaries of appellate judges, outside the Supreme Court. In addition, the State is at the expense of keeping up six different offices of clerks and court attendants, at an expense of at least \$3,000 more. There would be an actual saving to the State of at least \$6,000 a year by placing seven judges upon the Supreme Bench and dispensing with the Courts of Appeals.

It is not uninteresting, in this connection, to notice the composition of courts of last resort in other states. Each of thirteen States have three judges; in two, South Carolina and West Virginia, there are four; in thirteen, five; in three, six; in ten, seven; in two, Maine and Maryland, eight; while New Jersey completes the list with a Court of Errors and Appeals consisting of sixteen judges.

The twelve other states in the Kansas class are Colorado, Florida, Missis-

issippi, Montana, Nebraska, Nevada, North Dakota, South Dakota, Oregon, Texas, Utah and Wyoming. Of these, only Mississippi and Texas have over a million inhabitants. Nine of them have less than half a million. More than half the population of Mississippi is colored, which, together with other conditions peculiar to that state, renders unnecessary a large judiciary. In addition to a Supreme Court of three judges, Texas has a Court of Criminal Appeals composed of three judges, and five separate Courts of Civil Appeals in each of which are three judges. Thus, Texas, with a population only half again as great as Kansas, nearly a fourth of which is colored, has permanent courts, in which are twenty-one judges to do the work Kansas puts upon three.

Georgia, Iowa and Ohio have each six judges on their Supreme benches.

The States having seven judges each are, California, Illinois, Kentucky, Massachusetts, Missouri, New Hampshire, New York, Pennsylvania, Vermont and Rhode Island. In two of these, California and Missouri, the Courts are authorized to sit in two divisions; thus, in case of press of business, giving the relief to be obtained from two courts. California has, also, five commissioners, assisting the court, much as the commissioners did in this state. Some of these States have, also, permanent appellate courts, inferior to their Supreme Courts, which assist in the appellate work. Colorado has a Court of Appeals of three judges. Indiana has such a court of five judges. Illinois has four appellate courts of three judges each. Missouri has two Courts of Appeals of three judges each. New York is divided into four departments, in the first of which is an appellate court of seven judges, and in each of the others one of five judges. Pennsylvania has recently created an appellate court, called the Superior Court, composed of seven judges. Ohio, as an aid to her Supreme Court of six judges, has appellate courts known as Circuit Courts, the State being divided into eight circuits, with three judges in each circuit.

It will thus be seen, that, as a rule, appellate courts inferior to the Supreme Court are not created, except when necessary to assist higher courts having already six or seven judges.

The Supreme Court will be well up with its work before the end of the present year; and will probably have a comparatively restful year in 1900. But, as we have seen, 1901 will turn into that court a large number of cases from the Courts of Appeals, swelling the dockets again to five or six hundred, with a constant stream of probably not less than fifty new cases each month. For the ten months of the year that the court has sittings, there would be sixty cases to be heard and decided each month. This number will doubtless increase with the natural increase of the population and wealth of the State.

In each of the last two years, the judges of the Supreme Court have written about 275 opinions. In addition, they have examined and dismissed quite a large number of cases, in which no opinions were written. It is fair to assume that fewer of the cases brought to that court, when it is up with its

work, will be dismissed or disposed of without a hearing on the merits. Cases in which an early hearing can be had will not be appealed unless the losing party believes there is merit enough in his side of the case to warrant a contest in the higher court. Consequently, a less number of the cases filed can be heard and disposed of in a given time. Three hundred cases are, probably, as many as the Supreme Court, as now constituted in number of the judges, should be required to hear and determine each year.

Let us look then for a moment at what the future promises. In January, 1901, the court will have, say, 600 cases awaiting a hearing. At the end of the year, 800 of these are still unheard and 600 more cases have been filed during the year. The court, then, takes up the work of 1902 with 900 cases on the docket. Six hundred of these, and 600 new cases, a total of 1,200, confront the court in January, 1903. And by January, 1905, or five years after doing away with the Courts of Appeals, the Supreme Court is 1,800 cases behind its docket, or about six years.

Such a situation would be as detrimental to the rights of the citizens of the State as that from which we are now emerging. No one, having a just appreciation of personal rights, can know these facts, and not be moved to such action as will result in adequate provision to avert such a clogging of the wheels of justice. That guaranty of protection under the law which is held out to every citizen is a mockery and hollow pretense, when he is forced to seek it through wearisome and vexatious delays which often amount to a substantial denial of justice.

To provide against such inevitable situation, there must be an increase of the number of the Supreme Court judges, or some provision must be made for another appellate court. The legislature now in session should be shown the necessity of submitting, at the next general election, a proposition to amend the Constitution so that the Supreme Bench can be increased. The fact that a similar proposition was defeated some years ago should not be considered a sufficient reason for not taking this step now. The people understand, to-day, as they did not then, the needs of the State and the pressing necessity for the adoption of such amendment.

I have stated that there are only about 193 cases pending in the Northern Department of the Courts of Appeals and new cases are being filed at the rate of about 173 each year. That Department is liable to get out of work before the end of its term; while the Southern Department has nearly 600 cases pending and new cases being filed at the rate of about 200 each year. For the two years remaining, the Southern Department will have before it nearly 1,100 cases, to only a little over 500 in the Northern Department. It might be well for the present legislature to make a better division of this work by putting some of the counties now in the Southern Department into the Northern.

This Association and the judges and lawyers of the State should be awake to the necessity and the importance of seeing to it that our judicial system

is changed in such a way as will satisfactorily and in the best manner meet the demands made upon the courts. There should be an end to mere temporary relief measures. Kansas is, in this respect, not in her proper class. Florida, the Dakotas, Wyoming, Utah and little Nevada, may get along all right with a Supreme Court of three judges. Kansas could do so twenty years ago; but that day has long since passed. True to her motto, Kansas is on her way to the stars.

## International Arbitration.

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BY JOHN T. BURRIS.

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"International Arbitration" has been chosen as the subject of this paper. The inhabitants of the earth, being organized into nations, with governments, laws, institutions and customs suited to the necessities and wishes of the citizens of those nations respectively; and these governments and the people of each being brought into daily intercourse and frequent rivalries with each other, in the effort for national and individual success and prosperity, the imperative necessity exists for some mode of adjustment and settlement of disputed claims and conflicting interests. The people have so increased in numbers, so "multiplied," since the days of Abraham and Lot, that they could not, if they would, end their strifes and avert threatened conflicts by separating, one taking to the right hand and the other to the left, as did those ancient worthies, but must abide, each individual in comparatively close proximity to his neighbor, and each nation in close commercial and other relations with all the other nations on the globe. And the question now is, may the difficulties between nations, resulting from conflicting interests and claims, be adjusted and settled more justly, more wisely, more cheaply, and more satisfactorily, by arbitration than by war?

As between individuals, living under the same government and subject to the same laws, no doubt is ever expressed, or difference of opinion entertained, among civilized men, as to whether disputes, when they arise, should be settled by the more peaceful arbitrament of the courts, or by a resort to physical force in deadly personal conflict, which is, in fact, petty war. And yet as between nations, many of even the most enlightened and

refined inhabitants of the earth, and including possibly a majority of the citizens of our own favored land, seem to believe that it would be difficult, if not impossible, to procure a fair, honest, and impartial tribunal, or to obtain a just and equitable decision. Thus, while they admit that courts and juries may safely be trusted to try and determine causes between their fellow citizens, they at the same time insist that, because in international disputes the members of the court or tribunal chosen to try the same must be selected from countries other than those which are parties to the controversy, therefore they would be liable to be partial to one, or prejudiced against the other, of the nations whose differences they were chosen to decide. It may be safely asserted that our knowledge of human nature and the history of the world unite in showing that claim to be absolutely groundless in reason and in fact.

Men are generally truthful, honest and just. Men universally admire truth, honesty and justice in their fellow men, and detest falsehood, treachery and hypocrisy. But men are also usually selfish, and desire the best things for themselves and those who stand nearest to them in the various relations of life. Some men, too, are revengeful and desire evil to those whom they believe have wronged them or their friends. All the actions of men are prompted and governed by motives, and they all lead to results. All improper motives and desires, including the desire for revenge, are the outgrowth of inordinate selfishness. Wherever man may be found, whether in a land of civilization or of barbarism, in the absence of all selfish motives, he will be in favor of that which he believes to be just and right; and wherever and whenever he may be called upon to act, whether in a public or private capacity, and when there is no personal interest to advance, but simply the question of the rights of others to be passed upon, he will be found in favor of a decision in harmony with his idea of equity and the law, under the facts of the particular case. To hold otherwise would be to attribute to man a malevolence or wantonness, or both, which would be destructive of human government and civilization, and lead to anarchy and confusion, and to the ultimate extinction of the race.

That men are generally reliable and that we believe them to be so, is proven by all our transactions with each other. No man ever fears that he will be misled, deceived or wronged by his neighbor, or by a total stranger, unless there be a selfish motive prompting to such deception or wrong. Men travel all over the world, and by all the known methods of conveyance, in the care and under the protection of those controlling the lines, instrumentalities, appliances and means of transportation, without the slightest fear or danger of being injured or wronged by those in whose charge they have voluntarily placed themselves. We trust, with a feeling of perfect security, the grocer, the baker, the butcher and the druggist. We feel absolutely certain of receiving a truthful and candid reply from any man we may chance to meet on the public highway, if we inquire concerning the road, or



any other matter affecting our safety, comfort or convenience. We retire at night without fear of assassination or any injury to person or property; and we have all these assurances of safety, not only because of the presence of the night watch, the police and the peace officer, but for the further and stronger reason that we know that men are generally honest, law-abiding and peaceable, and that none ever commit murder or other crimes, except when influenced so to do through selfishness or revenge.

Not only is it true that men are generally honest, truthful and just, and that we believe them to be so, and act upon that belief in all our business, social and other private transactions in life, but it is equally true that in the affairs of government—national, state and municipal—we assume that they do occupy that exalted state, both intellectually and morally, and we proceed upon that assumption in all the official and other public affairs in which men are called upon to act. The vast numbers, who in this and many other nations are called to act officially in the different departments of the government, and the degree of prosperity usually enjoyed by those nations, tend to prove that the more confidence is placed in men the more they will feel the dignity and responsibility of their position, and the better they will discharge the duties devolving upon them, and the wiser and more prosperous and happy will be the people, and the freer and better, and at the same time, the stronger and safer will be the government.

Among the very important duties of the American citizen is that of serving as jurors in the trial of causes, both criminal and civil, in courts of law. And while there are those who favor modifications of the present jury law, and a few who advocate the abolishment of the system altogether, yet there are none who desire either the repeal or change of the law providing for and governing trials by jury who do not propose to provide at the same time, and by the same legislative enactment, for the trial of causes between parties litigant, by some courts or tribunals comprised of citizens chosen and empowered to perform that duty. Of all the millions of this great Republic, there is not one sane man who would be in favor of abolishing all courts, boards, and other judicial tribunals, now organized and existing for the trial and determination of disputes and controversies as they arise among the people. But strange as it may appear, while all admit that it would be madness to leave the people without proper judicial tribunals for the peaceful settlement according to the forms of law, of the questions and differences growing out of the competitions and rivalries in the multitude of transactions of daily life, yet many insist that as between nations it would be impracticable to submit to the decision of a peaceful international tribunal, and that no reasonable mode of settlement exists except an appeal to arms.

So true is it that men generally and almost universally love truth, justice and honesty, and abhor injustice, fraud and cruelty, that in their frenzied zeal for the right they themselves sometimes violate law and perpetrate deeds of cruelty and injustice. As greatly to be deplored, and as vehemently

denounced, and as resolutely opposed as are the acts of mobs or lawless bodies of infuriated men, still it is an undeniable fact that they are in most cases the rude and violent manifestation of a love of justice and equity, or rather of a hatred and abhorrence of injustice, oppression and cruelty. There seems to be no reason to doubt that the more closely this matter is looked into and investigated by observant, thoughtful men, the more clearly will they perceive, and the more readily admit, that the great body of the people are truthful and honest, and that they so love their fellow men, and so admire and reverence that which is true and just and good, that they may safely be trusted as witnesses, jurors, arbitrators or umpires, in all matters of controversy between their fellow men. If so, why would not the same men, or the same kind of men, make suitable and reliable arbitrators in causes in which they had no interest, pending between nations other than their own? It is believed that no valid reason can be assigned why they would not.

The government of the United States and that of each one of the states of the American Union, is based upon the assumption that man is capable of self-government; that he possesses the intelligence and virtue essential to citizenship and sovereignty. The assumption of man's capacity and reliability is adhered to in all private business transactions, and in all the social and political relations of life. He is deemed both capable and worthy to exercise the elective franchise in all elections—national, state, county, and municipal—and is eligible to all the offices under the government of the United States and that of the state in which he lives. He may be chosen to preside in a judicial tribunal and expound and administer the law from the highest courts in the land. He is constitutionally eligible to a seat in either branch of the state legislature, or of the American Congress, where he may participate in the enactment of laws for the government of the people. He may be chosen in the manner prescribed by the constitution to be the chief magistrate and executive head of this great Republic. It would seem that a man thus endowed and thus trusted might worthily sit and righteously decide matters in controversy between nations, with which his was at peace, and in which neither he nor his nation had any interest. If not, why not?

Of all the matters affecting the relations and intercourse between nations, which might be subjects of arbitration, or causes for war, more than nine-tenths of them are now settled peaceably by formal treaty or official correspondence between the proper departments of the governments interested. So that less than one-tenth of the matters affecting the interests and threatening to disturb the peace of men, which rise to the dignity of international questions, are to be considered in determining as to the relative merits of arbitration and war as the means to be resorted to to secure and maintain rights and to prevent wrongs and redress grievances between nations. And it may be further observed in this connection that, of the comparatively small number of cases which have arisen between the more enlightened nations in recent years, and which have not been thus amicably settled by

treaty, or mutual agreement between the contending parties, not more than one-tenth of them have actually led to war; while the overwhelming majority of such cases have in fact been submitted to the arbitration of other and friendly powers, whose awards have been accepted and acted upon, and thus many bloody, expensive, ruinous, and unnecessary wars have been averted. And it is to be further noted that the tendency to peaceful settlement is increasing as rapidly and as certainly as intelligence, enlightenment and civilization are advancing in the world.

If then it be admitted, as it is in all nations claiming to be civilized, that all disputes between individuals should be tried and settled by courts organized for such purposes, that all rights should be protected and defended, and all grievances redressed, and wrongs punished, by the decision and judgment of judicial tribunals, legally qualified to hear and determine the same; what valid objection can be interposed to an international agreement between all, or such numbers as may elect to unite therein, of the civilized nations of the world, for the trial by courts of arbitration, of all matter of controversy between such nations, or any others, at their request, which might arise after the date of such agreement?

Among the objections suggested by the opposers of international arbitration is the alleged ground that, as it would require the assent of two independent nations to submit the case to the court of arbitration, therefore it would be unavailing in the case of a rebellion, or war between an independent nation and a portion of its inhabitants, as it is claimed that the nation, by agreeing with its rebellious subjects or citizens to submit the questions in dispute to arbitration, would by that very agreement recognize the independence of those in rebellion. This might be true if the agreement to submit contained no saving clause, or clause expressly disclaiming and disavowing any such meaning or intent, and expressly saving the right of such nation in that regard. There have been but few if any, rebellions of any great magnitude in modern times in which there have not been agreements entered into between the nation rebelled against and its citizens in rebellion, for the exchange of prisoners and other matters concerning the conduct of the war. And when such agreements are so entered into with such saving clause, there is no ground for claiming that they constitute an implied recognition of the independence of those in rebellion.

Another ground of objection to the settlement of controversies between nations by arbitration is that questions are liable to arise which affect national honor, or other matters of so delicate and important a character that no court of arbitration can be constituted which would be a safe tribunal to be entrusted with the decision of such questions; that is to say that the questions in dispute may be of a nature so fine, so exquisite and so peculiar that no human tribunal can be created wise enough and just enough to decide them, and that the only mode of settling such questions justly, equitably and righteously is by the arbitrament of war. If that is a fact, it is one

of the saddest facts connected with the mysterious character, life and history of man.

If in the dealings between men, each is liable to the other, and may be compelled to respond in damages by the judgment of a court of competent jurisdiction, for any unlawful infringement of the rights of such other, although such wrongful act of the wrongdoer involves the commission of the crime of treason, murder, arson, burglary, larceny, or criminal libel; and if, in such cases, and all other cases of wrongs done by one party and resultant injuries suffered by another party, the injured party seeks redress at all, he must seek it through the courts, and is never permitted to take the law into his own hands and attempt by force to right his own wrongs, redress his grievances, or vindicate his character and his honor, why, it may be asked, may not contending nations, with equal propriety, submit any and all questions of difference between them, to arbitrators, selected in a manner to be mutually agreed upon, who shall be absolutely disinterested and impartial, and who shall be citizens of nations alike friendly to both of the contending nations? There seems to be no reason why individual rights and wrongs should be inquired into, and individual disputes settled in state or national tribunals, that does not apply with at least equal force in favor of a like settlement of disputes between nations in international courts of arbitration.

But still another objection sometimes urged against courts of arbitration for the trial and settlement of international questions, is the fear expressed that a fair and impartial court could not be selected and agreed upon to hear and determine such controversies. This is probably the weakest objection of all, and the very last one that ought to be presented by an American citizen. In the ordinary business of trial courts we occasionally meet with a case in which one of the parties to a suit has been so misguided in his relations and transactions with his fellow men, or so misunderstood by them, that he believes, and his attorney believes, that the men who know him best and who ought therefore to be his warmest friends, are so prejudiced against him that he cannot have a fair and impartial trial by a jury of his county. But would any one claim that, because such cases sometimes occur, juries should, therefore, be dispensed with, or courts abolished? If it would be folly to abolish juries and close courts, because some men who might become litigants are very unpopular with their neighbors, would it not be equally unwise to refuse to resort to international courts, because some of the nations of the earth have made a history so darkened and disgraced by acts of treachery, cruelty and oppression as to merit the condemnation of the good of all lands? As in the state or national court the unpopularity of one of the litigants might be his own misfortune, so in a controversy in the international court, the unpopularity of one of the nations might be the misfortune of such nation, but neither would afford any argument against the wisdom and propriety of maintaining such courts.

There is no room for a reasonable doubt that in any controversy that

might arise between any two nations on the globe, a court consisting of such number of members as might be agreed upon, selected in a manner to be agreed upon, from nations other than those which were parties to the controversy, might be chosen that would be as fair and impartial as any court and jury that ever tried a case in the United States or any other land. Would not the nation then, which would now at this period in the history of the world, and of the civilization of the race, declare that it would not agree to submit its controversies with other nations, should any arise, to the decision of an international court of arbitration whose members were fairly selected, thereby confess to the inhabitants of the earth, either that its history and character was such, that it had come to be so despised by the people of all lands, that an international court could not be selected which would give it a fair hearing and decision, or else that it was not willing to agree to accept a just and fair decision? Certainly one or the other of the attitudes just named must be assumed for his country by the opposer of courts of international arbitration for the adjustment of international controversies.

But in the discussion of this question we are not left to speculation and theory alone, as we have had some experience in all the recognized modes of reconciling differences and bringing about agreements between contending nations and peoples. In 1812, our people believed that the United States had just cause or causes for war against Great Britain. War was accordingly commenced and carried on for more than two years. A goodly number of battles were fought, both on the land and on the water. Great numbers of men were killed on the one side and on the other. Vessels were taken and sunk, on both sides. Forts and guns, small arms and other munitions of war, were captured, and towns and regions of country were entered, taken possession of, and occupied by each of the belligerent parties. That war was waged on our part, as announced by both the executive and legislative branches of the government, in proclamations, acts, committee reports, and congressional resolutions, because of certain wrongs done and suffered to be done against us by the British government, some of which wrongs so complained of were specified and some only referred to as "other wrongs." The principal wrong specifically referred to was that of visiting American merchant vessels by British men-of-war and seizing American seamen who had once been British subjects, but who were naturalized citizens of the United States, and pressing them into the military and naval service of Great Britain. The last battle of that war and one of the most remarkable of any fought on the American continent up to that time, occurred at New Orleans on the 8th day of January, 1815. On the 24th day of December, 1814, just fifteen days before that great battle was fought, a treaty of peace was signed at Ghent, by the commissioners on the part of the United States, and those of great Britain, by the terms of which treaty everything that had been done or caused by the war was, as far as possible, undone. Under that treaty, prisoners on each side were to be released and restored to their comrades.

Captured forts, cannon, small arms, and other military stores, were to be restored to their former owners, and places held and occupied by the armies of either nation were to be surrendered to the nation to which they belonged; but not one single word appeared in that treaty about the impressment of American seamen, or any other matter which had been mentioned as being among the causes for the war. There were, however, provisions contained in that treaty for the settlement of questions other than those which had been enumerated among the causes of the war, and for the settlement of those questions by arbitration. That treaty provided, not for one court of arbitration only, but for three, each to settle a separate and distinct question in dispute between the two nations as to the true location of a boundary line; and that treaty was ratified by the senate on the 17th day of February, 1815, and promulgated by the President on the following day. These disputes between the two countries were not settled by the war, because they were not among the causes for the war. They could not have been settled by the decisive battle of New Orleans, for the treaty was signed fifteen days before that battle was fought. But the historical fact is that the real matters in controversy between the United States and Great Britain at that time were settled by treaty and arbitration and not by war. By adopting that peaceful course a little earlier, they might have saved to each nation many thousands of lives and many millions of dollars.

In 1871, there were again questions pending between the United States and Great Britain which threatened to again involve those two great nations in war with each other. But by the treaty of Washington of May 8th, 1871, the matters in controversy were submitted for settlement and decision to a board of arbitration, the members of which were selected in the manner prescribed by said treaty. The court, or board of arbitration, convened and organized at Geneva, December 15, 1871, and on the 14th day of September, 1872, made its award or decision in favor of the United States and against Great Britain, for the sum of fifteen and a half millions of dollars in gold. The claim thus settled by that award was for depredations upon our commerce committed during the war of the Rebellion by Confederate cruisers fitted out in Great Britain. Most of our people believed at the time, and still believe, that the award was too small; but there are probably none now who believe that it would have been better for our government to have refused to submit those questions to arbitration, or to have refused to abide by the decision when rendered. The award was in our favor; it sustained our claim, and vindicated us and our position in the controversy, and set us right before all the nations and peoples on the globe. It also, at the same time, by implication, at least, condemned the course of conduct of Great Britain, in that matter, and adjudged that government to pay to ours, for the benefit of the injured parties, damages in the very considerable sum of fifteen and a half millions of dollars, which sum was promptly paid. And thus was settled by the peaceful means of international arbitration, a serious international question be-

tween two of the mighty nations of the earth, and a war averted which, if it had occurred, must have cost each of those nations hundreds of thousands of lives and thousands of millions of dollars, but the final result and full consequences of which no man can tell.

Again, in 1892, certain questions concerning the seal fisheries on our north-west coast, existed between our government and that of Great Britain. By a treaty between the two nations, those questions were submitted to arbitration. The arbitrators met in Paris in February, 1893, and concluded their labors in August of that year. The decision rendered in that case was in the main against the contention of the United States. The arbitrators held that the government had no right of protection of property in the fur seals frequenting the islands of the United States in Bering Sea, when such seals were found outside of the ordinary three-mile limit. Some differences of opinion are expressed among our people as to the correctness of this decision, although it seems to be in harmony with the teachings of the best writers on international law. That all the inhabitants of the world have an equal right on the high seas, or in the open sea, is certainly true; that three miles out from shore is ordinarily the limit to which the exclusive jurisdiction of a nation owning the land extends, is also true; and that under the terms, "fishery," "fishing," and "fish," may be included codfish, mackerel, seals and whales and many other marine animals, is equally true. That board of arbitration did proceed, further, however, as it was authorized by the terms of the treaty to do, and provided for the protection of the fur seals from destruction by the mutual agreement and joint action of the two interested nations. But the question in all such cases is not whether the decision is exactly correct,--whether it is precisely such a decision as we would have rendered. We have no right to expect decisions, whether rendered by state, national, or international courts, to be absolutely and infallibly correct, and perfect. We do not look for perfection in anything human. The real question is, or ought to be, Is it preferable to war? Would any man in America, for a seal skin sacque for each woman in the land, or for all the fur seals that inhabit the waters of the great deep, involve in war the two grand, English-speaking nations of the world? Surely those who would prefer the arbitrament of the sword to the decision rendered by the court of arbitration in any one of the cases which have yet been decided by such tribunal in which our nation was a party, is not the safest friend or counselor either of his country or of his race.

Early in the year 1861, differences of opinion and sentiment, which had existed for many years among the people of the United States, culminated in fierce controversy and bloody war. It is not probable that at that period in our national history, or at the stage of civilization to which the world had then reached, our controversy could have been peaceably and equitably settled. The opinions entertained by men in the different sections of the country were so divergent and conflicting, the interests involved so vast, and the

feelings engendered so bitter, that the masses of the people on both sides seemed to be eager for the conflict. If, at that time, before Fort Sumpter fell, or the first hostile gun was fired, some great and good man had appeared before his countrymen, filled with love and sympathy alike for those of all sections, parties, races, and conditions, and proposed a compromise and settlement of the difficulties then existing, on terms just, equitable and honorable to all, his kindly suggestions would have been spurned and scouted by all parties and in all parts of the country. If this imaginary sage had called attention to the fact that the institution of slavery was the sole cause of all the trouble, and that it being morally wrong, ought to be abolished, but that neither party or section being wholly responsible for its original introduction, or its continued existence, in the land, that therefore the pecuniary loss to result to the masters by the liberation of the slaves ought to be assumed and paid by the government, the people of the North would have replied that such a proposition was absurd and impossible of accomplishment. They would have contended that under the Constitution the government had no power to incur such responsibility or assume such indebtedness, also that the sum required would be so enormous that it would bankrupt the government and create a debt that would weigh down the inhabitants of the land and their descendants through many generations, and, they would have added that they were in no way responsible for the existence of the evil and that therefore it would be grossly inequitable to require them to bear any portion of the burden of destroying the institution. They would probably have concluded with the declaration that they would wade through seas of blood to maintain their rights and their honor sooner than settle on terms so iniquitous and humiliating. To the same kind of proposition the people of the South would have argued that the institution of slavery was older than the government or the constitution, that the slaves were their property and not in the market. They would have also claimed that by such mode of settling the question in dispute, their slaves would be paid for out of the national treasury which belonged in common to all the people and that therefore they would be helping to pay for their own property, and they would most likely have ended by expressing a readiness to die in the last ditch rather than accept so infamous a proposition.

Such were the feelings and determination of the people of the United States on the one side and on the other, of the momentous question with which they were confronted, and upon which they were divided in the spring of 1861. What followed was the legitimate result of the condition of things then existing, including the opinions, the likes and dislikes, the partialities and prejudices, and the patriotism and pride of the American people.

And yet, as we, at this distance of time after the close of that war, look back at the stirring scenes of those eventful years, we cannot fail to perceive, and in our hearts to admit, that, had the people of this republic then foreseen and realized what we now understand and know, and had the same fra-



ternal feeling then existed between the citizens of the different sections of the country as does now exist, that great conflict could have been and would have been averted, and all the good and beneficent results of that struggle would have been obtained without the fearful sacrifices of blood and treasure which it entailed.

The number of slaves in the United States at the beginning of that war was between four and five millions. Their average value as estimated by their masters was about three hundred dollars each. Estimating them to number four hundred and a third millions, the aggregate value was one billion and three hundred millions of dollars. Now suppose, that by mutual agreement, or through the instrumentality of arbitrators, the government had become the purchaser and emancipator of all the slaves in the land, paying the masters therefor in the same kind of money or obligations, and raised by some of the same means employed in carrying on the war, every dollar of that large debt, both principal and interest, might have been paid many years ago, leaving the nation not only without a slave, but also without an outstanding bond or other evidence of indebtedness against it. But without any determined or prolonged effort to effect a peaceful settlement, they rushed to arms on the one side, and on the other, and the results form a most interesting page in the history of the nation and of the world.

At the close of the four years' struggle, the government of the United States, the Union army and the Union citizens, were enabled to join in the truthful statement that they had brought to a successful termination a war, grander in its proportions than any ever before waged between nations or peoples, and that they had achieved a victory more glorious than any recorded in the military history of the world. But that would have been a partial statement of the case only. Candor would have required them to add that they had fought about six hundred battles and heavy skirmishes, that they had lost, including those slain in battle and those who had died from wounds received, or diseases contracted in, the service, about four hundred thousand noble American citizen soldiers, that the whole land was filled with helpless widows and orphans, weeping sisters and brothers, and gray-haired mothers and fathers of those who had gone at their country's call, and died in defense of their country's flag; and that in addition to all that, they had contracted debts and liabilities aggregating the sum of three billions of dollars, the same being several hundreds of millions of dollars more than double the full estimated value of all the slaves in the United States.

Such being the results of the war as they affected the government and the Union army, who were the victors, it is proper next to observe its effects upon the vanquished. Their sufferings in field and camp were at least as great as those in the Union army, and their mortality as great, according to the numbers engaged. So that as large a proportion of their women and children were made widows and orphans, as was the case in the North, and all the bereavements and terrible privations and sufferings of the war were

quite as severe with them as with the more successful Union soldiers and people. But in addition, their slaves were all liberated without one dollar of compensation to them, their other personal property was consumed or destroyed, their lands were scorched, furrowed, peeled, devastated and laid waste from the Ohio and Potomac to the Southern gulf, and from the Atlantic to the Rio Grande. And they, as citizens of the United States were to help to pay the enormous national debt contracted by the government in carrying on the war against them, and to pension the soldiers against whom they had fought. Surely we must now all understand and know that if the people of this country could have foreseen all the horror of the war then about to be engaged in, and could have been induced to settle the matter amicably, on terms just and equitable to all sections and all classes, that slavery might have been abolished and all the beneficent results obtained by the war might have been secured, and we might have saved in all more than six hundred thousand precious lives, and in property and money at least five thousand millions of dollars.

If it be claimed that such settlement could not have been made, either by arbitration, or by mutual agreement without arbitration, for the reason that it would have required constitutional amendments and legislative enactments to give effect to such settlement, it may be stated as a sufficient answer to that objection, that the settlement of that question by the arbitrament of the sword required and compelled to be made amendments to the constitution and statute laws of the United States and to those of every state in the Union.

It therefore appears that our observation, our experience and all history unite in establishing the fact that war is not only the most cruel and barbarous, but also the most expensive mode of settling international difficulties that was ever devised by the wisdom or the folly, the ingenuity or the wickedness of man. And it further appears that in the very nature of things, from the constitution of the human mind, and its processes of reasoning and deciding, and from the principles of truth and justice, which support the law and influence the reasoning, the conclusions and decisions of men, that it is impossible that war or physical force ever did or ever can settle any question of truth, or justice, or law. The victor in war may compel an admission from the vanquished, that the law and the facts and the rights of the respective parties are as claimed by him, and both parties may act on that admission and agreement, but that does not change either the law, the fact, or the question of right. And it may be further observed that in every case in which nations go to war, they finally, at or after the cessation of hostilities, do enter into a formal settlement of their differences by treaty and arbitration, or by treaty alone.

It may be stated in conclusion that the system of international arbitration for the determination of all international disputes which cannot be settled by treaty alone, is in every way and from every point of view, as superior to

war as intelligence and virtue are to physical strength and brute force, or as civilized nations are to savage tribes, or as man is to the beasts of the field. And while the march of civilization is slow, yet there is a movement that is perceptible, and it is forward and continuous and irresistible. Under a silent but resistless force and magic power, the slave trade, and later on the institution of slavery itself, has been abolished throughout the world. Privateering, which simply was legalized piracy, has been denounced and abandoned by all enlightened nations, and duelling, which was war between individuals, is now branded as murder or felony and punished as such by the nations most advanced in civilization and refinement. And we have good reason to hope that during the first half of the century upon which we are soon to enter, war, which has been the curse of the nations through all the centuries, will cease throughout the world.

## **Jeremy Bentham.**

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BY SILAS PORTER.

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Among the law students who gathered at Oxford University to listen to Sir William Blackstone's remarkable series of lectures on the English law, was a young man destined to become the leader of a school of thought directly opposed to many of the theories laid down as axioms by that great commentator. The young man was Jeremy Bentham, pale-faced and thoughtful, physically weak, but in intellectual vigor a young giant with the courage of genius.

He was 28 years old when the Declaration of American Independence startled the world. Twenty-five years younger than Blackstone, he lived until 1832, witnessing much of the material development of the nineteenth, while he belonged to the eighteenth, century. In a broader sense, he belongs to all time, for he left the impress of his mind upon the science of government, legislation and morals, and his influence can be traced in the wisdom of reforms reluctantly acquiesced in a century after he demonstrated their necessity.

Jeremy Bentham was born in London in 1748, the son of an attorney, a fact which some of his English biographers have strongly hinted was not particularly to his credit. At all events, they have assumed that by reason of this his origin is considered to have been comparatively humble.

At an early age his mind developed remarkably. He read the history of England at three; he studied French at five, and was master of the violin at ten; from which I take it, he could play it or let it alone. His father surrounded him with tutors and masters in French and music. His early edu-

cation was hurried, and no expense spared to crowd him through its several stages. His physical appearance was so queer that he was frequently pointed out as a curiosity. He was exhibited upon all occasions by his foolish father as an intellectual prodigy. He had no childhood, no childish playmates. The untrammelled joys of boyhood he never experienced. If he knew anything of babbling brooks, of green fields and banks of clover, or of the song of wild birds, he learned it out of books. And so he grew up without companions suitable to his age, and in early life became solitary in his habits and something of a recluse. He was hurried to Westminster at eight, to Oxford at twelve, and Lincoln's Inn at sixteen, and thus we find him at an age when modern law students are still in the grammar schools, sitting at the feet of Blackstone.

The name of Jeremy Bentham is forever associated with law reform, though a considerable part of his long life was devoted to the study and development of a system of philosophy and morals. Bentham was considered the master of the utilitarian school of philosophy, of which the elder Mill and his son, John Stuart Mill, were also exponents.

The principle upon which the whole of Bentham's system of philosophy is based is that of utility. He held that utility alone is the criterion of right and wrong, and ought to be the sole object of the legislator. If this be true, it would seem that modern legislators have shifted a considerable distance from their proper base. Bentham made no pretensions of being the founder of the school. He adapted the idea of utility from earlier writers, but he claimed, and deserved credit for assuming, it as the exclusive test of all human action. "Utility," he says, "consists in procuring pleasure and avoiding pain. Certain actions should be prevented because they give rise to pain and evils." These he denominates crimes, in the punishment of which he held it essential to consider the pleasure or gratification experienced by the offender and the suffering of the person offended. The object of legislation he held to be the multiplication of pleasure and the diminution of pain, and the catch-phrase of his school was, "The greatest happiness principle."

But I personally care not a fig for his philosophy. He delights in analytical divisions and sub-divisions of his subject, and often ends in such an apparent confusion of ideas that no one but a philosopher, and that of the same school, can pretend to follow him. This idea of utility, however, underlies his system of morals and legislation as well as his philosophy.

I wish to speak of him as a law reformer. In order to understand the supreme courage of the man, and to appreciate his life-work, it is necessary to recall the state of English society and the condition of English law at the time he took up his warfare.

When Bentham began his career as a law reformer the condition of the English law was regarded by everybody with superstitious reverence. In substance and procedure it was considered by Blackstone as the "perfection of reason." Yet the common law, enveloped in a cloud of uncertainty, was

in its procedure full of absurd technicalities and useless fictions. The law of crimes was worse. Something like two hundred offenses were punishable by death, and the subtle refinements of the criminal procedure made the way full of pitfalls for the unwary. The common people were constantly oppressed by imprisonment for debt and distress for rent. Lord Eldon, esteemed by many as the greatest of the Chancellors, presided over the High Court of Chancery, but, like Blackstone, he was the type of the narrow conservatism of the time; he administered the law as he found it, and the vexatious delays of that court had already become proverbial.

Judge Dillion, in his work on the "Laws and Jurisprudence of England and America," acknowledges his affection and veneration for the great Eldon, but says of him: "It is certain that he never originated a reform act, and if he ever favored an act which can be fairly said to have been intended to amend the law, I do not know it."

In the Edinburgh Review published in 1817, I find an extract from Sergeant Hawkin's "Treatise on the Pleas of the Crown," which the author of the review cites as an illustration of the uncertainty with which the common law was surrounded. The extract is as follows: "If an appeal be once commenced by an heir who dies, hanging the suit, it seems to be agreed by almost all the books that no other heir can afterwards proceed in such appeal or commence a new one. But some have holden that if the first heir die within a year and a day without commencing an appeal, the next heir may bring one. But this is made a doubt by others; and the generality of the books seem to favor the contrary opinion; yet it is holden by Sir Matthew Hale and some others, that if the first heir get judgment in an appeal of death, and die, his heir may sue execution; but this is doubted by Sir William Staunford, and seems contrary to many of the old books, and not easily reconcilable with the reason of the cases above mentioned. But whether, in this case, the Court may not award execution, either ex-officio or at the demand of the King, may deserve to be considered. Also, if a person who is killed have no wife at the time of his death, and no issue but daughters, and all these daughters die within the year and a day, it may reasonably be argued that the heir male may have an appeal, because the right of bringing one never vested in any other before. But, finding this case in none of the books, I shall leave it to be more fully considered by others."

The reviewer then goes on to say: "All these doubts and difficulties and conjectures and uncertainties relate, it is true, to a branch of the law which has seldom, in the course of the last three centuries, been executed; but it should be remembered that it is a law which it is in the power of private individuals to call at any time into activity; that accident alone is to determine on whom the power of reviving it shall be cast; and that, when called into action, it is men's lives that it will dispose of. For the cases thus left unprovided for, or, which is the same thing, which are so provided for that the most learned lawyers cannot say what the provision is, some law ought surely

to be made. The matter being involved in such obscurity that one of the first criminal lawyers the country has produced can only state what the inconsistent authorities are, can venture no further than to advance doubts and probabilities, and to suggest topics for argument, it must be incumbent on the Legislature to provide what the law shall be in the future to prevent the Court from being hereafter so much dishonored as it surely must be, if our tribunals are to be assembled to decide whether an individual shall suffer death for a murder imputed to him, upon no consideration of anything that has relation to his guilt or innocence, but upon legal subtleties applicable only to the descent of real property, upon an examination of ancient records, upon a comparison of the weight that is due to the opinions of Sir Matthew Hale and Sir William Staunford, and upon some law which no man, till the case occurred, could venture to state had any existence, and which is brought to light only by antiquarian research, and forensic acuteness, amongst clashing and inconsistent authorities, out of a mass of material under which it had remained buried for centuries past."

In fact, the English common law at the time rested in old black-letter statutes, embraced in many volumes, and in the scattered reports and opinions of the judges pronounced in a great variety of cases, which had disclosed small portions of it from time to time, just as the circumstances and necessities of men in a state of society had chanced to require or give occasion for its promulgation. It necessarily happened that a large part of it rested unpublished because the occasion for declaring it had never occurred. Under the common law there was no case unprovided for, though there were many on which no decision had been pronounced because the occasion for declaring it had not arrived.

To Bentham's mind this gave to the judges the power, practically, to enact law by judicial legislation. He spoke of it as "judge-made law." It failed to meet with his theories of legislation, for he argued that the judges, instead of considering from the standpoint of utility what the law in a given case should be, concerned themselves entirely with discovering what the law must necessarily have been, at the remote period when the common law is supposed to have had its origin. Against this "judge-made" law Bentham directed his vigorous logic, determined, if possible, to demolish the system.

For the reasoning of the ablest judges Bentham had but little respect. Their adherence to the rule of precedent met with his severe condemnation. According to Blackstone, the rule of *stare decisis* admits of this exception: "Where the former determination is most evidently contrary to reason, and much more if it be clearly contrary to divine law." (Black. Com. vol. 1. page 69.)

But Blackstone insists that the judges "in so doing are not making a new law, but vindicating the old from misrepresentation."

Judge Dillon, in his work before referred to, gives to Blackstone the praise of never having been, among elementary law writers, quite equaled; but he

confesses that Blackstone lacked, or failed to exercise, the critical faculty in his admirable exposition of English law. "To Blackstone," he says, "the field of English law seemed a paradise, with everything to delight the mind and the eye; to Bentham it was a howling wilderness, full of all sorts of unclean birds and ravening beasts." And then he adds: "In sober earnest, it was neither."

Blackstone is, upon almost all occasions, the apologist for what he finds established. He was the conservative, Bentham the radical. Bentham tried everything by the measure of utility. He found no use in the fictions and technicalities of the old common law. He was the great questioner of the usefulness of things established. He was not afraid of innovation. That a law was old and grounded in antiquity was no argument to him of its usefulness. In his "Book of Fallacies," published in 1824, he enumerates, among other fallacies, the notion that the antiquity of a law gives to it any force. "To suppose," he says, "that there is anything which a whole nation cannot do, which they deem essential to their happiness, and that because another generation, long ago dead and gone, said it must not be done, is mere nonsense." He cites as another prominent fallacy that of an irrevocable law. He says: "The despotism of Nero or Caligula would be more tolerable than an irrevocable law." He was the enemy of case-law. He gives an account of his first and last experience in the actual practice. Some wily opponent evidently sprung a "circus case" on him at an opportune moment, and the result was his life-long disinclination to have anything more to do with the business. He relates his experience as follows: "A case was brought to me for my opinion. I ransacked all the Codes. My opinion was right according to the Codes, but it was wrong according to a manuscript unknown to me containing a report of I know not what opinion said to have been delivered before I was born, and locked up as usual for the purpose of being kept back or produced as occasion served."

Imagine his feelings should he return to earth and attempt the practice of the profession in the closing years of this century, when he should find that, however well he might ground his opinion upon the elementary principles of law, however strongly he might fortify it with logic, he dare not boast nor lay his armor down until the last carload of publications from St Paul be searched, and the latest cases from the Pacific States and Territories consulted in fear and trembling.

He abandoned all notions of practice and conceived the idea of reforming the whole system of English law. His ambition went beyond this and contemplated a reform of the whole system of legislation and morals. His theory of utility was to be applied severely to legislation, to the end that legislation should become a science. He naturally met with opposition from lawyers, from the judges and from public men generally. He began the battle at the age of twenty-five and never laid down his weapon until death overtook him at the ripe age of eighty-four. He believed the system foul



and corrupt. He saw no way of amending it but to demolish the frame-work and begin all over again.

The Englishman is always conservative, and at that time conservatism ruled the bench and bar and dominated in government circles as well as in literature and morals. The lawyer everywhere, by reason of his habits of thought, his professional training, his acquired inclinations, is conservative; he loves the old forms, the old ways, the old law. And in Bentham's time every suggestion of a change was considered heresy. So that he needed courage and resolution to begin, perseverance and great logical powers to continue, his assault upon existing institutions. He was unsparingly attacked for fifty years of his life by the reviewers. He came to believe that the judges and the lawyers were leagued against reform from insincere and mercenary motives, and he attacked, from that time forth, both bench and bar with his pen. He called the lawyers "fee gatherers."

The fictions of the common law always excited his wrath and sarcasm. Bentham had no use for a fiction. It was no answer to say that when the fiction found its way into the procedure or the principles of the law there was some sensible purpose in its adoption that could not be otherwise served. He was as matter-of-fact as Peter Bell among the flowers, of whom Wordsworth says:

"A primrose by the river's brim,  
A simple primrose was to him—  
And it was nothing more."

To Bentham a fiction was a fiction, and it was nothing more. That "the King never dies" meant simply that the office never becomes vacant; and he held it were better to say that the office of the King never becomes vacant.

He disliked the jargon with which the courts surrounded their procedure, as witness the following from his "Judicial Evidence," vol. 5, p. 287: "The antiquated notation of time suffices of itself to throw a veil of mystery over the system of procedure. Martin and Hilary, saints forgotten by devotees, are still of use to lawyers. How many a man has been ruined because his lawyer made a mistake, designed or undesigned, in reckoning by the Almanack? First of January, second of January, and so forth—where is the science there? Not a child four years old that does not understand it. But Octavos Quindecims and Morrow of All Souls, St. Martin, St. Hilary, the Purification Easterday, the Ascension and the Holy Trinity, Esoign Day, Day of Exception, Retorno Brevium Day, Day of Appearance, Alias Quartos, Die Post, Alias Dies Amoris—there you have a science. Terms Michaelmas, Hilary, Easter and Trinity, each of them about thirty days, no one of them more than one day—there you have not only a science but a mystery. Do as the devils do, believe and tremble."

He gives an account of a buffetings of the litigant, "tossed from courts spiritual to courts temporal, from courts temporal to courts spiritual, by Blackstone called Courts Christian."

His first work, "A Fragment on Government," appeared in 1776. This was published anonymously and attracted immediate attention. The style was clear and vigorous, and for a long time the work was credited to Lord Mansfield. It was an attack on parts of "Blackstone's Commentaries" and the theories advanced by Blackstone as to the origin of government. Two years later he published a pamphlet criticising the Hard Labor bill which was drawn by Blackstone and Eldon. Soon after, he published his "Critical Jurisprudence," in which his law reform was fairly launched. His "Defense of Usury" appeared in 1727, and has been called an unanswered and unanswerable argument against usury laws. It apparently had not the slightest effect upon legislation on that subject for more than fifty years, but the wisdom of his theories is acknowledged now in those States in which usury laws have been abolished, and probably the time will come when his theories upon that subject will be adopted everywhere. His "Protest Against Law Taxes" appeared in 1796. His great work on "Legislation" was published in Paris in 1802, and attracted attention at home and abroad. He was voted a French Citizen by the Assembly and honored by the friendship of statesmen and philosophers everywhere.

Such prejudice, however, continued to exist against his theories in England that most of his subsequent works were published first in France. His work on "Codification," upon which he is said to have spent ten years of his life, appeared in Paris in 1817, and his "Rationale of Judicial Evidence" a year later. Besides these works dedicated to law reform, he published a great many books concerning morals and philosophy, further mention of which I shall omit.

Bentham's "Judicial Evidence" is considered to have been one of his most effective attacks on the English law. In this the absurd and technical rules of evidence were ridiculed and their injustice exposed with merciless logic. "In certain cases," he says, "jurisprudence may be defined as the art of being methodically ignorant of what everybody knows."

This work, published in Paris as early as 1818, was not published in England until 1826, and like his "Defense of Usury," was regarded as visionary. He attacked particularly the rules relating to the competency of witnesses. It was not until after his death that the wisdom of his assault upon the law of evidence began to be recognized and his teachings bore fruit, first in 1842, when by Lord Denman's act interest in actions at common law ceased to disqualify a person from testifying, and later by Lord Brougham's acts, in 1846 and 1851, parties in civil actions could be compelled to testify.

Judge Dillon, in his work on "English and American Jurisprudence," before referred to, says, with reference to the effect of these statutes:

"I believe I speak the universal judgment of the profession when I say that changes more beneficial in the administration of justice have rarely taken place in our law, and that it is a matter of profound amazement, as we look back upon it, that these exclusionary rules ever had a place therein, and

especially that they were able to retain it until the last fifty years."

Lord Justice Stephen, in his introduction to his "Digest of Evidence," says that Bentham's attack on the system of judicial evidence "was like the bursting of a shell of the powder magazine of a fortress, the fragments of the shell being lost in the ruin which it has wrought."

It must not be supposed that Bentham found nothing to admire in the system of English law. He admitted that the legislative enactments and the reports of adjudged cases contained more valuable material for the construction of a system of laws than any other nation in the world possessed, but he maintained that it was far from being the perfection of human reasoning; that it was a "fathomless and boundless chaos, made up of fiction, tautology, technicality and inconsistency, and the administrative part of a system of exquisitely contrived chicanery, which maximizes delay and denial of justice."

While more than ten years of his life were devoted to his great work, "The Constitutional Code," he spent really more years than that in an attempt to induce governments to adopt it. He cherished for a long time the hope that some government would delegate to him authority to prepare for its adoption a code of laws, and thus his theories of philosophic legislation and his system of uniformity in judicial procedure might meet with a practical demonstration. With this object in view, he corresponded with governments on all sides of the earth. In 1814 he began a correspondence with Emperor Alexander of Russia. He knew that since 1800 the leading statesmen of Russia had had in mind the grouping of the laws of the Empire into a kind of system, and he offered his services in the preparation of a Code. The correspondence produced no decided results. He had long looked with eagerness to our country as a suitable field, and in 1811 addressed a letter to President Madison upon the subject, but the breaking out of the war with England delayed the correspondence and nothing came of it. He then corresponded with the Governor of Pennsylvania and offered to prepare a Code of civil and penal laws for adoption by the Legislature. His proposal, after considerable delays, was made the subject of a special message to the Legislature by the Governor, to which no attention seems to have been paid. In later years he gave considerable time to the idea of a Code of Laws for the Central and South American Governments, and carried on an interesting correspondence with their agents, but was again doomed to disappointment.

Evidently the Pennsylvania Legislature cared but little for his theories, or, it may have been that some of them remembered that he had been unfriendly to the cause of American Independence, and had indulged in some very caustic criticisms of what he chose to call "the vague generalities" of the immortal Declaration of Independence. It is more than likely, however, that few, if any, of the members of that body knew who or what Jeremy Bentham was.

A few years ago business called me to a county seat town in Pennsylvania, and I found the members of the bar discussing a recent innovation in the

criminal procedure. Some of the more conservative were inclined to doubt the wisdom of the change. A term of court had just closed, and a brother lawyer explained to me that for the first time in the history of jurisprudence there a man charged with crime had been permitted to testify on oath in his own behalf. Observing that I was somewhat startled, he explained that before the innovation it had always been customary to permit a defendant in a criminal case to make a statement, "not under oath;" but I learned also that it was customary for the court to kindly instruct the jury that they might take such statement *cum grano salis*, and were at liberty to disregard it. I knew that Jeremy Bentham had been stone dead for about sixty years, that his "Judicial Evidence" was out of print, and rare copies only found in large libraries, but I wondered what he would say if he should come back for a few days to life, as he always said he wanted to, when he should realize that at last the Pennsylvania Legislature had heard of his reforms if it had never heard of him.

In his earlier writings, such as "A Fragment of Government," "Defense of Usury," and several works upon government and special subjects, Bentham's style is admirably clear, vigorous, and, above all, logical. It is a pleasure to follow him here; but he shut himself up alone for years, seeing no one but a few chosen followers, and gradually he developed a style of writing intricate and involved. To add to the deformity of his style, he constantly coined new words, new phrases and expressions, which none but his disciples could translate. This jargon was called 'Benthamee' by his followers and critics. Many of his works are so marred by these defects as to discourage one who attempts to read them. The world is indebted to John Stuart Mill for a revision of his "Judicial Evidence," and the scholarly Frenchman, Dumont, for carefully revised editions of his principal works. But even Dumont's laborious and faithful efforts are not equal to the task of making his works really inviting, except to the patient toiler. One of his critics published in the *Edinburg Review* in 1824 a review of his "Book of Fallacies," and begins by saying: "Whether it is necessary there should be a middle man between the cultivator and possessor learned economists have doubted; but neither God's men nor booksellers can doubt the necessity of a middle man between Mr. Bentham and the public. Mr. Bentham is long. Mr. Bentham is occasionally involved and obscure. Mr. Bentham invents new and alarming expressions. Mr. Bentham loves division and sub-division—and he loves method more than its consequences. Those only, therefore, who know his originality, his knowledge, his vigor and his boldness will recur to the works themselves. The great mass of readers will not purchase improvement at so dear a rate; but will choose rather to become acquainted with Mr. Bentham through the medium of reviews, after that eminent philosopher has been washed, trimmed, shaved and forced into clean linen."

But he was always considered legitimate game for the critical reviewers, and it was not until the early part of the present century that any of them

conceded the importance of his work, or were willing to admit his inherent greatness.

He devoted so much of his life to the idea of a systematic codification of the laws that we must not omit a reference to his work in this connection. We are indebted to him for the words "codification," "international," "maximize," "minimize" and many others now in common use.

His scheme of codification was not entirely practicable. His plan could only have been adopted, if at all, by first sweeping away the whole body of law, beginning at the foundation and then embracing all general legislation as it should then exist, except local and special statutes, the whole so systematically arranged that every possible case would be provided for by written rules of procedure.

But he had set men to thinking, and his influence can be traced wherever partial codification, either in England or America, has been accomplished.

When Edward Livingstone constructed the Code of Louisiana, he followed, as far as then seemed practicable, the methods of Bentham, and acknowledges his indebtedness to Bentham in his correspondence with him in 1829.

The adoption by so many of the American States of the Codes of Civil and Criminal Procedure, by which the intricacies of common law pleading, with its fifty or sixty forms of declarations, its special pleas, replications, rejoinders, rebutters and sur-rebutters, common counts and general issues, have given place to one form of action and defense, and the abolishing of separate courts of law and equity, substituting one tribunal for the trial of actions at law and in equity, are tributes to Bentham's greatness. And in England the litigant is no longer "tossed from pillar to post, from courts spiritual to courts temporal, from courts temporal to courts spiritual." Since 1873, by Act of Parliament, Queen's Bench, Exchequer, High Court of Chancery, Admiralty, Probate, Divorce and Bankruptcy all united in one Supreme Court, one form of action established and all distinctions between law and equity jurisprudence abolished.

The work of codification, in the meantime, is going on slowly but surely—not along the lines exactly as Bentham hoped, but silently and, perhaps sometime approximately accomplished.

The moral courage he displayed in making a life-long warfare against this system can only be appreciated by considering that he found the system entrenched behind obstacles which would have deterred most any reformer. There was the ingrained conservatism of the English people, the natural conservatism of Bench and Bar, all opposed to changes; and there was the idea which prevailed everywhere, the result of teachings of the other school represented by Eldon and Blackstone. In the words of Blackstone, "The law is the perfection of reason, and that which is not reason is not law."

In 1829 he established the Westminster Review as the organ of the Radicals, with Dr. John Bowring, his intimate friend, as the editor. Bowring published a complete edition of Bentham's works in 1843 in eleven volumes,

octavo. This is the best edition of Bentham, and with it are published many of his letters and some interesting reminiscences by the editor.

Said a writer in the *Edinburgh Review*, in 1827, speaking of Bentham: "A citizen of the world, in its purest sense, he suffered no opportunity which presented itself of benefitting his fellow man in any portion of the globe to pass without endeavoring to improve it." Another writer in the same *Review*, criticising his great work on *Legislation*, says: "So large a quantity of original reasoning has seldom, we believe, been produced by one man."

John Stuart Mill, in his *Essay on Bentham*, speaks of him in the following language: "Bentham is one of the great seminal minds of his age. He is the teacher of teachers. \* \* \* It is by the modes of thought with which his writings inoculated a considerable number of thinking men that the yoke of authority has been broken and innumerable opinions formerly received on tradition as incontestable are put upon their defense and required to give an account of themselves."

Sir Samuel Romilly, by many regarded as the greatest lawyer of his time, was one of the very few persons in England who, as early as the last century, acknowledged Bentham's claim to distinction and admitted the influence of his writings.

Lord Brougham, in 1838, spoke of him as follows: "None of the great men before him had attempted to reduce the whole of jurisprudence under the dominion of fixed and general rules; none ever before Mr. Bentham took in the whole department of legislation; none before him can be said to have treated it as a science, and by so treating made it one. This is his pre-eminent distinction. To this praise he is justly entitled, and it is as proud a title to fame as any philosopher ever possessed." (Lord Brougham's *Speeches*, *Edinburgh*, 1838. Vol. II, p. 288.)

In 1874 Sir Henry Maine said: "I do not know a single law reform effected since Bentham's day which cannot be traced to his influence."

In conversation with Talleyrand, his biographer, Bowring, once remarked: "Of all modern writers, Bentham was the one from whom most has been stolen, and stolen without acknowledgment." Talleyrand's reply was: "True, and robbed by everybody, he is always rich."

Macaulay, in an article published in the *Edinburgh Review*, in July, 1832, just after Bentham's death, said: "The services which M. Dumont has rendered to society can be fully appreciated only by those who have studied Mr. Bentham's works, both in their rude and in their finished state. Of Mr. Bentham we would at all times speak with the reverence which is due to a great original thinker, and to a sincere and ardent friend of the human race. In some of the highest departments in which the human intellect can exert itself he has not left his equal or his second behind him. From his contemporaries he has had, according to the usual lot, more or less than justice. He has had blind flatterers and blind detractors—flatterers who could see nothing but perfection in his style, detractors who could see nothing but

nonsense in his matter. He will now have judgment. Posterity will pronounce its calm and impartial decision; and that decision will, we firmly believe, place in the same rank with Gallileo and with Lock the man who found Jurisprudence a gibberish and left it a science."

Bentham's character developed painful inconsistencies which often led to the estrangement of his dearest friends. His vanity was almost proportionate to his greatness of mind in other respects. His fortune was sufficient to enable him to live in comfort and to entertain his friends; and from the time when his writings had begun to attract the attention of eminent men, he always kept about him a little society of scholars like the elder and younger Mill, Dumont and others. These have given us the details of many conversations which illustrate the inordinate vanity of the man, but are nevertheless interesting. In appearance he is said to have resembled Benjamin Franklin, and the oddities of his character were displayed by many peculiarities in dress and personal habits. He enjoyed the pleasures of the table to the very last of his long life. He never married, and lived for fifty years almost entirely without relatives or kinfolk near him. And yet, it seems, with all his oddity of character, his life was not without its little romance. When a young man, and at a time when his labors had begun to bring him into prominence, he was frequently a visitor of Lord Shelburne at Bowood. There he formed the acquaintance of a young lady, and in due time made her an offer of marriage. The offer was rejected. Neither married, and they never afterward met. Near the close of his busy life, when past eighty, he finds time from his labors on codification and his correspondence with governments to write her a touching, simple letter, in which he reminds her of an incident in one of their lovers' walks, when she had given him a flower; and he adds: "Since that day not a single one has passed in which you have not engrossed more of my thoughts than I could have wished." His biographer has preserved this and her reply, from which we learn that in the long years her affection, too, had survived.

Despite the intellectual vigor of his mind, he confessed that he was possessed all his life with an unreasonable fear of ghosts, though he had convinced himself, by systematic investigation, that such things never existed. He was afraid to go to sleep in the dark, and required an attendant each night to read him asleep, and he always kept a light burning in his room to assure him in case he awakened suddenly in the night. His mother died when he was twelve, and his father married a second time. He never liked his stepmother, but the principal reason seems to have been that she always called him "Mr. Jerry," and had a habit of drinking the roast mutton gravy out of the dish before she sent it below. Bentham, apparently from having been in his youth so often deprived of his share of this, had come to attach, in after life, a great importance to roast mutton gravy, and never permitted himself to get so deeply interested in conversation at table to prevent him from watching with a jealous eye the distribution of that dish. His motto

in that respect, Dumont says, was: "Every man to his own spoonful."

The great Lord Eldon he called "The Lord of Doubts." John Doe and Richard Roe he called "The turtle doves of the law," and he might have had in mind the results of our Kansas Prohibitory Law when he uttered the following with reference to an irrevocable law (at all events, it seems to fit the present situation in several particulars): "When a law is immutable and happens at the same time to be too foolish and mischievous to be endured, instead of being repealed, it is clandestinely evaded or openly violated, and thus the authority of all law is weakened."

M. Dumont draws a parallel between Bentham and Montesquieu, and says of the latter:

"No writings can be mentioned which have done so much for the human race, in their generation, as Montesquieu's Spirit of the Laws, and from which, at the same time, a reader of the present day can bring away so few sound available ideas. In making this contrast it never should, and never will, be forgotten, that we are chiefly indebted to Montesquieu himself for the present comparative uselessness of his justly celebrated work."

Not a little of this will apply, no doubt, at this day, to the works of Bentham; but we can acknowledge his merit, and derive great benefit from the study of his life and many of his works. Every lawyer ought to read his "Defense of Usury."

When a youth, he modestly declined to attach his signature to the Thirty-nine Articles of Faith, giving as his reason that he had never examined them. He took nothing for granted. He was a kind of a Missourian in his way of reasoning. He had to be shown.

In an age when capital punishment was inflicted for the pettiest form of petty larceny, he boldly advocated the utter abolishment of the death penalty. Leaving out of the reckoning all account of the numerous positive reforms to which he is justly entitled to the credit, the world owes much to his sublime courage in daring to stand alone for a new order of things. His faults were many, his schemes not always practicable, but, actuated by a sincere and lofty purpose, he accomplished much for the welfare and happiness of mankind.

Wyckliffe has been called the Morning Star of the religious Reformation. Bentham was the Wyckliffe of Law Reform.



## Hypnotism as a Defense in a Criminal Action.

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BY HARRY G. KYLE.

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This is a skeptical and materialistic age. We relegate things of a mysterious character to the domain of superstition. Hypnotism is one of the mysteries we look upon with somewhat of an aversion of feeling. Scientists have been devoting a persistent energy to the investigation of psychological phenomena for the last century. The result of their investigation, whatever it may be, must be given a just consideration. It is the nature of man to investigate. When Newton's law of gravitation was made known to the world, men began to investigate and soon astronomy from chaos and empiricism became an exact science. When the true atomic theory had been found, the mysterious alchemy became an exact science of chemistry. After having examined the mysterious world about him, man naturally turns to himself, the most mysterious thing of creation, and begins to investigate.

However mysterious and imperfect the science of hypnotism may seem, if such a power exists, and one person can exercise it upon another, it may affect the legal relations of the one controlled by such a power. A man's actions are presumed to be the result of the free exercise of his will power. He is created with the freedom to exercise the power of the will and the law judges him accordingly. There are provisions wisely made in cases wherein it is shown that he did not have the complete control and free exercise of the will, as in cases of duress and insanity. Should there be such a power as hypnotism, and that an individual could be made a victim of its influence, the influence would be similar to that of duress and would be governed by similar principles.

## HYPNOTISM AS IT EXISTS.

Is there such a thing as hypnotism? The investigation of this subject has been made by a few scientists. It has been confined to the realm of experimenting and has not appeared in practical life. From its mysterious nature it has been looked upon by the public with doubt and suspicion. To determine whether there is such a power and its characteristics, we must examine the result of the investigation. Mesmer of Paris, in 1778 was the first to advocate the theory that one individual could influence and control, the will of another. This was called mesmerism. Since then, scientists have been investigating the influence, and the phenomena of mesmerism are now explained by modern hypnotism which of late has been extensively studied. In investigating, the authorities on the subject, it will be found that all agree that there is such a power as hypnotism. But they disagree in many questions relating to it and it is this that makes it an indefinite and inexact science,—if it may yet be called a science.

Probably the best theory advanced as to an explanation of how this power is exercised, is the doctrine of duality of mind, which recognizes two minds; the subjective mind and the objective mind. The objective mind takes cognizance of the objective world. Its media of observation are the five physical senses. Its highest function is that of reasoning. The subjective mind takes cognizance of its environments, by means independent of the physical senses. It perceives by intuition; it is this that is acted upon by hypnotic suggestion. The objective senses must be in abeyance for it to perform its highest functions. The subjective must have control of the objective. This is why consent of the subject is an important factor of hypnotism.

The science of hypnotism is based almost exclusively upon laboratory experiments. Human beings are not like inanimate atoms, capable of being delicately tested by a fixed rule. These experiments prove nothing definite. There are some traces of consciousness that remain to tell the subject he is playing a comedy, consequently he will suffer slighter resistance. He will more readily try to commit murder with a piece of paper than with a real dagger. He will always dimly realize the real situation. While these experiments prove nothing definite, they prove there is such a power as hypnotism and a possibility of its being used for criminal purposes.

Experiments show that every external suggestion made in a hypnotic state is resisted with greater or less resistance by a force within the subject himself; this is called auto-suggestion. Auto-suggestions, arise from the habits of thought of the individual and the settled principle and convictions of his whole life. "The more deeply rooted are these habits of thought, principles and convictions, the stronger and more potent are the auto-suggestions, and the more difficult are they to overcome by the contrary suggestions of another." One author says it is impossible for an hypnotist to impress a sug-

gestion so strongly upon a subject as to cause him actually to perform an act in violation of the settled principles of his life. It would be indeed the greatest thunder-bolt cast at Jehovah's throne, could virtue and innocence be victimized by such a power.

Whether hypnotism can be successfully employed for the commission of crime, depends, in each individual case, upon the character of the person hypnotized. Settled principles and convictions are not so deeply rooted in some individuals as in others; they might be overcome by criminal suggestions or the subject might be of a criminal character.

#### PROOF OF HYPNOTISM.

I do not think it would be difficult to prove that there is such a power as hypnotism. The late authorities, Benet, Fere, Moll, and Hudson, all agree that the possibility of committing a crime by this power is certain. The proof of such a force as hypnotism, if it be publicly demonstrated during the course of a trial, would open up a new defense by creating in the minds of the jurors a reasonable doubt, which undoubtedly could be used in many cases to defeat the ends of justice; though it must be recognized that no person under the influence of such a force, should be convicted to suffer the penalty for a crime which he did not intend to commit, and which at the time, he did not know he was committing.

To the credit of humanity, all the suggested crimes have been confined to the harmless sphere of experimenting and hardly appeared in real life. Should this defense be made with sufficient evidence to be judicially considered, there would be many difficult questions arise in determining whether the defendant had acted without responsibility upon a criminal suggestion made by another. It would be necessary to prove, first—that the defendant was subject to such influence. Authorities on the subject say it is not every one who is subject to hypnotic power. An experiment performed on the defendant during the course of the trial would not be sufficient evidence, because he would be too willing to submit to the influence. Evidence showing that he had weak will power would be uncertain. Only evidence showing that he had at some previous time been under the influence would be substantial.

Second—Was the defendant really hypnotized?

This can be determined only by his actions. No man can swear as to the condition of the mind of another at the time he did an act. According to the principles of post-hypnotic suggestion, (that is, a suggestion that remains after the subject has been hypnotized), where the subject has control of his will, except as to this suggestion his actions may be rational in regard to everything but the committing of this deed. In this case, the lack of motive would have to be shown.

Third—Was there a criminal suggestion made while the defendant was hypnotized?

This proof becomes necessary from the nature of the defense, the defend-

ant claiming that he acted upon no motive within himself, but on the suggestion of another.

Fourth—Who made the suggestion?

If the defendant was hypnotized and acted upon a criminal suggestion, it is necessary to prove who hypnotized him. According to the principles laid down by those who advocate the theory of hypnotism, the subject is under the control of the hypnotist; no one else can influence the subject, therefore no one but him could have made the suggestion. This power is so uncommon to individuals, that the question would arise, Who could have exercised the power? The defense would probably not be made without stating who had such a control over the defendant.

Fifth, and the most important of all—To what degree is the defendant suggestible?

This, as we have seen, depends upon the character of the defendant. It must be determined whether his principles of morality, habits of thought, and convictions according to his settled principles of life could be overcome by a criminal suggestion contrary to his mode of thinking. It is shown by experiments that it is impossible to make the subject drink a glass of water, if he is told that it is wine, when this is against the habits and settled principles of his life. If the defendant is a criminal character, he would be more susceptible to criminal suggestions. But if of a criminal character, this would prejudice a jury against the genuineness of such a defense.

The question of proof would be very difficult and could hardly be established only in cases in which the defendant had consented to be hypnotized and had sufficient direct evidence to establish the fact that he was hypnotized. In a case of this kind, it would hardly be probable that a hypnotist would make a criminal suggestion, because of the responsibility resting upon him. It is claimed by some, that the great danger of this power being used as an instrument in committing crime, is that the subject may be induced to believe that he is acting without restraint. But this would only be possible in the case of morally defective persons, and in this case, if the defendant had no motive, he would soon realize it was not a normal thing for him to do, and would begin to enquire into what power had come over him.

#### THE RESPONSIBILITY OF A HYPNOTIZED SUBJECT.

It certainly would be very difficult to establish a good defense of hypnotism. But should it be established, the following rules would apply to the defendant. If in a case, the subject had consented to be hypnotized without any knowledge or intention of acting upon a criminal suggestion, and commits a crime as a result of a criminal suggestion of the hypnotist, he is not responsible for the crime; having entered into the transaction with no criminal intent, and commits the crime without the freedom of decision. A French writer on this point says, "Those who voluntarily submit to hypnotism, are in about the same predicament as those who by alcohol or other narcotic agencies put themselves into a state of bondage when they cannot

with certainty control their judgment or free will." In the case of voluntary intoxication, there is a willful drinking; this is wrong and therefore furnishes the necessary criminal intent. It is on the same principle which renders one guilty, who intends to do one wrong and commits another. Voluntary submission to hypnotism is not wrong, unless the subject knew or should have known he was placing himself in criminal hands.

The case would be different if the subject had caused the criminal act to be suggested to him with the view of carrying out a crime more courageously and under the cloak of irresponsibility. He had the freedom of decision when he submitted to the hypnotic power, and the submitting to the power was the cause of the crime. Therefore he would be liable.

Consent, as has been stated before, is a very important factor in hypnotism. Many of the early writers claim that in no case can the power be exercised without it. But the *late* authorities claim there are cases when it can be exercised, when the subject is unaware and in a few exceptional cases against the wishes of the subject. If the subject was hypnotized without his consent, he certainly would not be liable for his acts. In a California case, 38 Pac. 689, hypnotism was attempted to be made a defense; an appeal was taken to the Supreme Court on a point of evidence. The court said in referring to the lower court, "The court ruled out the evidence as to the effect of hypnotism, and I think rightly. There was no evidence which tended to show that the defendant was subject to the disease, if it be such." If hypnotism should be regarded by the courts as a disease, then all actions in a hypnotic state must go unpunished. Punishment for an act committed in a state of mental disease would be a violation of our principles of justice.

The legal aspect of hypnotism as a defense has never been judicially determined in our courts nor in those of any other country. There are cases in France in which crime was committed on the hypnotized subject, but these from their ludicrous exhibitions, as the trial of Eyraud, have produced nothing definite. We have a case in the 55 Kan., the State of Kansas vs. Graz, which recognizes the influence one may have over another by convicting one for a higher degree of crime who did not commit the crime, but counseled, advised, and procured its commission by the hands of another. This case is the nearest to hypnotic influence of which we have any record.

The great question relating to hypnotism is not in regard to the application of the law, but the question of proof. It is for this reason that we have not had more attempts to bring it forward as a defense. Should it come before the courts, it would be judicially scrutinized, and there are many reasons why it should be discouraged. If recognized as a defense, it would afford the criminal a new avenue of escape, especially in cases in which there seemed a lack of motive. It is a power which no individual has a right to exercise over another. It ought not to be allowed in experimenting. It does not give any assistance to medical science, and there is no good to be seen in its influence.

In conclusion it need only be said, that the defense of hypnotism is possible only in cases where there is sufficient direct evidence, to show that the defendant was under the control of such a power, and acted without any fault of his own. This as yet, has never been accomplished, and because of the difficulty of proof, and the fact that the science of hypnotism is so inexact and indefinite, it is hardly probable that it could be made a defense.

## Constitution and By-Laws.

### Constitution.

ARTICLE 1. The name of the Association shall be The Bar Association of the State of Kansas.

ART. 2. The object of the Association shall be the elevation of the standard of professional learning and integrity, so as to inspire the greatest degree of respect for the efforts and influence of the bar in the administration of justice, and also to cultivate fraternal relations among its members.

ART. 3. The officers of the Association shall be a President, Vice-President, Secretary, Treasurer, and an Executive Council of five members.

ART. 4. The President shall preside at all meetings of the Association, and shall open each annual meeting of the Association with an appropriate address. The Vice-President shall preside in the absence of the President; and in the absence of both, a president *pro tem.* may be elected by the meeting. The Secretary shall keep a record of all the proceedings of the Association, and conduct the correspondence of the Association.

ART. 5. The Treasurer shall keep an account of all funds of the Association. The Executive Council shall manage the affairs of the Association, subject to the constitution and by-laws.

ART. 6. A quorum for the transaction of business shall be twenty members.

ART. 7. No person shall be admitted to membership of this Association who is not a member of the bar of the Supreme Court, and who has not been engaged in the regular practice of the law for one year next preceding his application for admission.

ART. 8. All applications for membership shall be referred to the Executive Council, who shall report the same to the Association, with their recom-

mendation thereon; and no person shall be admitted to membership except by a two-thirds vote of the members present. Each member shall pay an admission fee of five dollars, and annual dues of three dollars.

ART. 9. The annual meetings of the Association shall be held in January of each year, at the capital, at such time as the Executive Council fix. Thirty days' notice of the annual meeting shall be given by the Secretary. Special meetings may be called by the Executive Council, of which meetings thirty days' notice shall be given to the members by the Secretary,

### By-Laws.

SECTION 1. The Executive Council shall, on or before the first day of May of each year, designate such a number of members, not exceeding six, to prepare and deliver or read at the next annual meeting thereafter appropriate addresses or papers upon subjects chosen and assigned by the Council to each of said members, as may be so selected for such purpose.

SEC. 2. The order of exercises at each annual meeting shall be as follows:

1. Opening address by the President.
2. Consideration of applications for membership.
3. Reports of Secretary and Treasurer.
4. Report of Executive Council.
5. Reports of standing committees.
6. Reports of special committees.
7. Delivering and reading of addresses and papers.
8. Miscellaneous business.
9. Election of officers and delegates to American Bar Association.

SEC. 3. There shall be chosen by ballot, at each annual meeting, three members as delegates to American Bar Association for the ensuing year.

SEC. 4. All addresses delivered and papers read before the Association, the copy of which is furnished by the author, shall be lodged with the Secretary. The annual address of the President, the reports of committees, and all proceedings of the annual meeting, shall be printed; but no other address delivered or paper read shall be printed, except by order of the Executive Council.

SEC. 5. The terms of office of all officers elected at any annual meeting shall begin at the adjournment of such annual meeting, and end at the adjournment of the next annual meeting. And in case of any vacancy, the Executive Council shall appoint some member to fill the vacancy, who shall hold until his successor is elected.

SEC. 6. The Treasurer's accounts and reports shall be examined annually by the Executive Council before their presentation to the Association, and the Executive Council shall report the result of such examination of Treasurer's report and accounts to the Association at its annual meeting.

SEC. 7. The Executive Council shall cause to be printed such a number of copies of the proceedings of its annual meeting as it shall deem best, not exceeding one thousand copies, and shall distribute the same to members of



the Association, and to such other persons, or associations, or societies, as they may deem prudent; and shall, with the proceedings of each annual meeting, print the roll of active and honorary members of the Association, and its constitution and by-laws.

**Sec. 8.** Every member of the Association shall pay to the Treasurer on or before the first day of May, of each year (after the year of his admission), annual dues of three dollars. All members who have not paid their annual dues on or before May 1 shall, within thirty days thereafter, be notified of this fact by the Treasurer and requested to forthwith comply with the requirements of this by-law.

**Sec. 9.** The Secretary shall keep a "general membership roll" on which shall appear in alphabetical order the name of every member of the Association from its organization, with the date of his admission.

The Secretary shall also keep an "Honorary membership roll" to be composed of those members who shall be specially designated for this honor, by resolution of the Association on the formal written recommendation of the Executive Council.

The Secretary shall also prepare on the first day of March in each year, the "roll of active members" of the Association for that year, which shall include only those who have paid to the Treasurer their Association dues for the preceding year and the new members by whom no dues are payable for that year.

**Sec. 10.** The Treasurer shall, twenty days before the first day of March in each year notify all active members in arrears for the dues of the preceding year, that the roll of active members for the year, to be printed in the Annual Report of the proceedings, will be made up on that date, and that their names must be omitted from that published roll of active members, unless their delinquent dues have been paid.

**Sec. 11.** Only the active and honorary members of the Association shall be entitled to participate in the proceedings of the Association, or to a seat at its annual banquet.

**Sec. 12.** On the general membership roll opposite each name omitted from the active membership roll, shall be noted the reason for such omission—whether death, non-payment of dues, or personal request.

**Sec. 13.** Any member whose name has been omitted from the active membership roll for non-payment or dues, may have his name restored to such roll by the payment of the years' dues for which he is in arrears.

**Sec. 14.** The standing committees of the Association shall consist of the following:

Judiciary Committee—Five members.

Committee on amendment of laws—Five members.

Memorial Committee—Three members.

Committee on Legal Education and University Law School—Five members.

## Published Roll of Members.

### Honorary Members.

NAME AND ADDRESS.	
Hon. David J. Brewer.....	Washington, D. C.
Hon. Henry Wade Rogers.....	Chicago
Hon. Seymour D. Thompson.....	St. Louis
Hon. John W. Henry.....	Kansas City, Mo.
Hon. Nathaniel M. Hubbard.....	Iowa
Hon. P. S. Grosscup.....	Chicago
Hon. Samuel A. Kingman.....	Topeka
Hon. Thomas Ewing, Jr.*.....	New York City
Hon. L. D. Bailey*.....	Lawrence, Kan.

\*Deceased.

### Active Members.

NAME AND ADDRESS.	
Alden, H. L.....	Kansas City, Kan.
Allen, S. H.....	Topeka
Benson, A. W.....	Ottawa
Bentley, Fred W.....	Wichita
Benton, C. E.....	Fort Scott
Bergen, A.....	Topeka
Berger, A. L.....	Kansas City, Kan.
Bird, W. A. S.....	Topeka
Bond, T. L.....	Salina
Bone, H. J.....	Ashland
Bowman, C. S.....	Newton
Boyle, L. C.....	Fort Scott
Broderick, Case.....	Holton
Bucher, Charles.....	Newton
Burris, John T.....	Olathe
Burdick, Wm. L.....	Lawrence
Bowman, Noah L.....	Garnett
Calderhead, W. A.....	Marysville
Campbell, M. T.....	Topeka
Clark, George W.....	Topeka
Clarke, W. B.....	Kansas City, Mo.
Cliggett, Morris.....	Pittsburg
Coleman, C. C.....	Clay Center
Cornell, George G.....	Alma

## ACTIVE MEMBERS—CONTINUED.

NAME AND ADDRESS.	
Cowles, W. H.	Topeka
Cunningham, E. W.	Emporia
Curtis, C. H.	Burlingame
Campbell, P. P.	Pittsburg
Cochran, F. P.	Cottonwood Falls
Cox, C. A.	Chanute
Dana, A. W.	Topeka
Dassler, C. F. W.	Leavenworth
Dewey, T. E.	Abilene
Dillard, W. P.	Fort Scott
Dolman, J. E.	Topeka
Doster, Frank	Marion
Downey, Francis E.	Topeka
Day, J. W.	Topeka
Dobbs, C. J.	Topeka
Dean, J. S.	Marion
Elliot, C. E.	Wellington
Ellis, A. H.	Beloit
Evans, W. F.	Topeka
Evans, C. J.	Topeka
Falloon, James	Hiawatha
Fenlon, Thomas P.	Leavenworth
Ferry, L. S.	Topeka
Foster, C. G.	Topeka
Foster, F. H.	Topeka
Freeman, Winfield	Kansas City, Kan.
Frith, J. Harvey	Emporia
Foster, F. H.	Parsons
Farrelly, H. P.	Chanute
Garver, T. F.	Topeka
Getty, George	Syracuse
Glasse, W. B.	Columbus
Gleed, C. S.	Topeka
Gleed, J. W.	Topeka
Godard, A. A.	Topeka
Graves, Chas. B.	Emporia
Green, J. W.	Lawrence
Grattan, G. F.	McPherson
Guthrie, W. W.	Atchison
Guthrie, W. F.	Atchison
Glass, W. S.	Marysville

## ACTIVE MEMBERS—CONTINUED.

NAME AND ADDRESS.	
Gilbert, W. D.	Atchison
Hagan, Eugene	Topeka
Hamilton, Clad	Topeka
Harrison, T. W.	Topeka
Hayden, Charles	Holton
Hayden, Sydney	Holton
Heizer, R. C.	Osage City
Herrick, J. T.	Wellington
Hessin, John E.	Manhattan
Hick, R. S.	Westmoreland
Hobbs, Bruno	Kansas City, Kan.
Holt, W. G.	Kansas City, Kan.
Hopkins, Scott	Horton
Horton, Albert H.	Topeka
Huron, G. A.	Topeka
Hurd, A. A.	Topeka
Hasen, Z. T.	Topeka
Harvey, A. M.	Topeka
Herrick, R. T.	Topeka
Hamilton, J. D. M.	Topeka
Houston, J. D.	Wichita
Jackson, H. M.	Atchison
Jetmore, A. B.	Topeka
Johnson, W. A.	Garnet
Johnson, J. G.	Garnet
Johnson, Frank O.	McPherson
Johnston, W. A.	Minneapolis
Jones, Howel	Topeka
Keeler, Henry	Topeka
Kelso, David	Leavenworth
Kimball, C. H.	Parsons
Kimble, Sam	Manhattan
Kenna, E. D.	Chicago
Larimer, J. B.	Topeka
Larimer, H. G.	Topeka
Lamb, G. H.	Yates Center
Lewis, C. A.	Phillipsburg
Little, E. C.	Abilene
Littlefield, W.	Topeka
Lloyd, Ira E.	Ellsworth
Loomis, N. H.	Topeka

## ACTIVE MEMBERS—CONTINUED.

## NAME AND ADDRESS.

Martin, David.....	Atchison
Martin, F. L.....	Hutchinson
Martin, John.....	Topeka
McCleverty, J. D.....	Fort Scott
McClure, J. R.....	Junction City
McFarland, E. A.....	Lincoln
McFarland, J. D.....	Topeka
Milton, B. F.....	Dodge City
Moore, O. L.....	Abilene
Merriam, Frank D.....	Topeka
Miller, O. L.....	Kansas City, Kan.
Milliken, J. D.....	McPherson
Monroe, Lee.....	Hays City
Moore, McCabe.....	Kansas City, Kan.
Morris, R. E.....	Kansas City, Kan.
Morris, W. H.....	Girard
Mulvane, David W.....	Topeka
Mills, F. D.....	Kansas City, Kan.
Miller, M. M.....	Topeka
McBride, W. H.....	Independence
McBride, W. T.....	Wellington
Overmyer, David.....	Topeka
Osborn, S. J.....	Salina
Parker, J. W.....	Olathe
Peck, George R.....	Chicago
Perkins, L. H.....	Lawrence
Perry, W. C.....	Fort Scott
Perry, Albert.....	Troy
Pickering, I. O.....	Olathe
Porter, Silas W.....	Kansas City, Kan.
Postlethwaite, John C.....	Jewell City
Pringle, J. T.....	Burlingame
Quinton, E. S.....	Topeka
Redden, A. L.....	Topeka
Riggs, S. A.....	Lawrence
Roark, Wm. S.....	Junction City
Roberts, John W.....	Hutchinson
Rossington, W. H.....	Topeka
Root, H. C.....	Topeka
Ryan, Thomas.....	Topeka

## ACTIVE MEMBERS—CONTINUED.

## NAME AND ADDRESS.

Randolph, L. F.	Nortonville
Sedgwick, T. N.	Parsons
Slonecker, J. G.	Topeka
Sluss, H. C.	Wichita
Smith, C. B.	Topeka
Smith, Chas. W.	Stockton
Smith, Wm. R.	Kansas City, Kan.
Spencer, Chas. F.	Topeka
Stillwell, L.	Erie
Summerfield, M.	Lawrence
Switzer, John F.	Topeka
Simmons, John S.	Dighton
Stanley, W. E.	Wichita
Saum, W. E.	WaKeeney
Stoker, Geo. E.	Topeka
Thomson, Wm.	Burlingame
Troutman, J. A.	Topeka
Tracy, B. H.	Wamego
Turner, R. H.	Mankato
Tufts, J. F.	Atchison
Valentine, D. M.	Topeka
Valentine, H. E.	Topeka
Vance, A. H.	Topeka
Vernon, W. H.	Larned
Waggener, B. P.	Atchison
Wall, T. B.	Wichita
Ware, E. F.	Topeka
Watkins, Albert.	Topeka
Wells, Abijah.	Seneca
White, T. J.	Kansas City, Kan.
Whiteside, H.	Hutchinson
Williams, F. L.	Clay Center
Wood, O. J.	Topeka
Worley, J. S. B.	Osawatomie
Wilson, John O.	Salina
Wheeler, Bennett R.	Topeka
Wells, Frank.	Seneca
Wilder, Geo. C.	Manhattan
Welch, R. B.	Topeka
Wise, Z. S.	Hutchinson

## Mortuary Roll.

NAME AND DATE OF DEATH.	
Bailey, L. D.	Oct. 15, 1891
Campbell, A. B.	Dec. 20, 1897
Crozier, Robert.	—1895
Douthitt, Wm. P.	Nov. 28, 1897
Everest, A. S.	Oct. 22, 1894
Ewing, Jr., Thos.	Jan. 21, 1896
Green, H. T.	
Griffin, Charles T.	
Greer, John P.	Nov. 28, 1889
Gillett, Almerin.	
Hamble, C. B.	
Harris, Amos.	Feb. 2, 1891
Holt, Joel.	April 27, 1892
Humphrey, H. J.	Aug. 8, 1890
Hurd, T. A.	
Hollowell, J. R.	June 24, 1898
Johns, H. C.	
Johnson, J. B.	May 18, 1899
Lewis, Ellis.	Aug. 12, 1897
Maltby, J. C.	April 27, 1898
McMath, E. A.	Aug. 29, 1898
Prescott, J. H.	July 5, 1891
Ritter, John N.	Feb. 8, 1896
Robinson, R. G.	April 18, 1898
Randolph, A. M. F.	Sep. 1, 1898
Scott, W. W.	May 31, 1890
Stillings, E.	Feb. 8, 1890
Stephens, N. T.	
Spilman, R. B.	Oct. 19, 1898
Thacher, S. O.	Aug. 11, 1895.
Usher, John P.	April 13, 1889
Wagstaff, W. R.	
Webb, Leland J.	
Wolfe, Eugene	
Webb, W. C.	April 19, 1898









# **Proceedings of the Bar Association of the State of Kansas.**



**Seventeenth Annual Meeting.  
1900.**



SEVENTEENTH ANNUAL MEETING

OF THE

BAR ASSOCIATION

OF THE

STATE OF KANSAS.

---

HELD IN THE CITY OF TOPEKA, JANUARY 30 AND 31, 1900

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THE TIMES  
CLAY CENTER, KANSAS.  
1900.



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**OFFICERS FOR THE YEAR 1900.**


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**PRESIDENT** ..... **SAM KIMBLE**  
**VICE-PRESIDENT** ..... **SILAS PORTER**  
**SECRETARY** ..... **D. A. VALENTINE**  
**TREASURER** ..... **HOWEL JONES**

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**Executive Council.****B. F. MILTON, CHAIRMAN.**

**J. G. SLONECKER,** **SIDNEY HAYDEN,**  
**W. E. SAUM,** **JOHN T. BURRIS.**

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**Delegates to American Bar Association.**

**FRANK DOSTER,** **A. H. HORTON,** **W. LITTLEFIELD.**

**Alternates.**

**W. R. SMITH,** **L. STILLWELL,** **M. P. SIMPSON.**

**Judiciary Committee.****DAVID OVERMEYER, CHAIRMAN,**

**J. T. HERRICK,** **H. P. FARRELLY,** **G. H. LAMB,** **B. P. WAGGENER.**

**Committee on Amendments to Laws.****F. L. WILLIAMS, CHAIRMAN.**

**JNO. D. MILLIKEN,** **J. W. PARKER,** **H. F. MASON,** **S. J. OSBORN.**

**Memorial Committee.****JOHN C. POSTLETHWAITE, CHAIRMAN,**

**J. T. PRINGLE,** **EUGENE F. WARE.**

**Committee on Legal Education and State University Law School.****EUGENE HAGAN, CHAIRMAN,**

**W. S. ROARK,** **ED. C. LITTLE,** **FRANK WELLS,** **J. W. GREEN.**

**Committee on Membership.****A. BERGEN, CHAIRMAN,**

**A. H. ELLIS,** **T. B. WALL.**

## OFFICERS OF PREVIOUS YEARS.

## OFFICERS FOR THE YEARS 1883-4.

<i>President</i> .....ALBERT H. HORTON		<i>Secretary</i> .....W. H. ROSSINGTON
<i>Vice-President</i> .....N. T. STEPHENS		<i>Treasurer</i> .....D. M. VALENTINE

## Executive Council.

D. M. VALENTINE, <i>Chairman</i> .	JAMES HUMPHREY,	DAVID MARTIN,
J. H. GILLPATRICK,		FRANK DOSTER.

## OFFICERS FOR THE YEAR 1885.

<i>President</i> .....ALBERT H. HORTON		<i>Secretary</i> .....W. H. ROSSINGTON
<i>Vice-President</i> .....W. A. JOHNSTON		<i>Treasurer</i> .....D. M. VALENTINE

## Executive Council.

D. M. VALENTINE, <i>Chairman</i> ,	JAMES HUMPHREY,	DAVID MARTIN
E. S. TORRANCE,		L. HOUK.

## OFFICERS FOR THE YEAR 1886.

<i>President</i> .....ALBERT H. HORTON		<i>Secretary</i> .....JOHN W. DAY
<i>Vice-President</i> .....E. S. TORRANCE		<i>Treasurer</i> .....D. M. VALENTINE

## Executive Council.

W. A. JOHNSTON, <i>Chairman</i> ,	JOHN GUTHRIE,	A. W. BENSON,
M. B. NICHOLSON,		JOHN H. MAHAN.



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OFFICERS FOR THE YEAR 1887.

<i>President</i> .....	SOLON (). TEACHER	<i>Secretary</i> .....	JOHN W. DAY
<i>Vice-President</i> .....	HENRY C. SLUSS	<i>Treasurer</i> .....	D. M. VALENTINE

## Executive Council.

W. A. JOHNSTON, <i>Chairman</i> ,	C. B. GRAVES,	ROBERT CROZIER,
GEORGE S. GREEN,		T. F. GARVER.

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## OFFICERS FOR THE YEAR 1888.

<i>President</i> .....	W. A. JOHNSTON	<i>Secretary</i> .....	JOHN W. DAY
<i>Vice-President</i> .....	EUGENE F. WARE	<i>Treasurer</i> .....	D. M. VALENTINE

## Executive Council.

JOHN GUTHRIE, <i>Chairman</i> ,	S. B. BRADFORD,	GEORGE J. BARKER,
J. W. ADY,		J. H. MAHAN.

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## OFFICERS FOR THE YEAR 1889.

<i>President</i> .....	JOHN GUTHRIE	<i>Secretary</i> .....	CHAS. S. GLEED
<i>Vice-President</i> .....	T. F. GARVER	<i>Treasurer</i> .....	D. M. VALENTINE

## Executive Council.

B. F. SIMPSON, <i>Chairman</i> ,	W. W. SCOTT,	L. B. KELLOGG,
A. W. BENSON,		CHAS. S. HAYDEN.

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## OFFICERS FOR THE YEAR 1890.

<i>President</i> .....	ROBERT CROZIER	<i>Secretary</i> .....	C. J. BROWN
<i>Vice-President</i> .....	CHAS. B. GRAVES	<i>Treasurer</i> .....	HOWEL JONES

## Executive Council.

B. F. SIMPSON, <i>Chairman</i> ,	JOHN GUTHRIE,	CASE BRODEBICK.
W. W. SCOTT,		R. M. EATON.

**OFFICERS FOR THE YEAR 1891.**

<i>President</i> . . . . . D. M. VALENTINE	<i>Secretary</i> . . . . . C. J. BROWN
<i>Vice-President</i> . . . . . L. HOUK	<i>Treasurer</i> . . . . . HOWEL JONES

**Executive Council.**

T. F. GARVER, <i>Chairman</i> ,	E. W. CUNNINGHAM,	M. B. NICHOLSON,
J. R. McCLURE,	W. P. DOUTHITT.	

**Officers for the Year 1892.**

<i>President</i> . . . . . T. F. GARVER	<i>Secretary</i> . . . . . C. J. BROWN
<i>Vice-President</i> . . . . . J. W. GREEN	<i>Treasurer</i> . . . . . HOWEL JONES

**Executive Council.**

W. C. WEBB, <i>Chairman</i> .	C. ANGEVINE,	E. W. MOORE,
WINFIELD FREEMAN,	A. A. HARRIS.	

**Officers for the Year 1893.**

<i>President</i> . . . . . JAMES HUMPHREY	<i>Secretary</i> . . . . . C. J. BROWN
<i>Vice-President</i> . . . . . H. L. ALDEN	<i>Treasurer</i> . . . . . HOWEL JONES

**Executive Council.**

J. D. MILLIKEN, <i>Chairman</i> ,	N. H. LOOMIS,	A. H. ELLIS,
SAM KIMBLE,	H. W. GLEASON.	

**Officers for the Year 1894.**

<i>President</i> . . . . . J. D. MILLIKEN	<i>Secretary</i> . . . . . C. J. BROWN
<i>Vice-President</i> . . . . . F. L. MARTIN	<i>Treasurer</i> . . . . . HOWEL JONES

**Executive Council.**

H. L. ALDEN, <i>Chairman</i> ,	SAM KIMBLE,	J. W. GREEN,
T. L. BOND,	E. W. MOORE.	

**OFFICERS FOR THE YEAR 1895.**

<i>President</i> .....	H. L. ALDEN	<i>Secretary</i> .....	C. J. BROWN
<i>Vice-President</i> .....	J. B. LARIMER	<i>Treasurer</i> .....	HOWEL JONES

**Executive Council.**

SAM KIMBLE, <i>Chairman</i> ,	T. B. WALL,	A. A. GODARD,
E. A. MCFARLAND,	J. D. MCCLEVERTY.	

**OFFICERS FOR THE YEAR 1896.**

<i>President</i> .....	DAVID MARTIN	<i>Secretary</i> .....	C. J. BROWN
<i>Vice-President</i> .....	WM. THOMPSON	<i>Treasurer</i> .....	HOWEL JONES

**Executive Council.**

A. A. GODARD, <i>Chairman</i> .	T. B. WALL,	W. R. SMITH,
M. B. NICHOLSON,	JOHN W. DAY.	

**OFFICERS FOR THE YEAR 1897.**

<i>President</i> .....	WM. THOMPSON	<i>Secretary</i> .....	C. J. BROWN
<i>Vice-President</i> .....	S. H. ALLEN	<i>Treasurer</i> .....	A. A. GODARD

**Executive Council.**

C. C. COLEMAN, <i>Chairman</i> ,	JOHN W. ROBERTS,	LEE MONROE,
MCCABE MOORE,	C. B. GRAVES,	

**OFFICERS FOR THE YEAR 1898.**

<i>President</i> .....	S. H. ALLEN	<i>Secretary</i> .....	C. J. BROWN
<i>Vice-President</i> .....	C. C. COLEMAN	<i>Treasurer</i> .....	A. A. GODARD

**Executive Council.**

C. B. GRAVES, <i>Chairman</i> ,	J. D. MCFARLAND,	LEE MONROE,
L. C. BOYLE,	MCCABE MOORE.	

**OFFICERS FOR THE YEAR 1899.**

<i>President</i> .....	C. C. COLEMAN	<i>Secretary</i> .....	C. J. BROWN
<i>Vice-President</i> .....	SAM KIMBLE	<i>Treasurer</i> .....	HOWEL JONES

**Executive Council.**

SILAS PORTER, <i>Chairman</i> ,	J. C. POSTLETHWAITE,	E. W. CUNNINGHAM,
J. T. PRINGLE,	J. W. PARKER.	



# MINUTES

## OF THE

### SEVENTEENTH ANNUAL MEETING

*TOPEKA, KANSAS, Jan. 30, 1900.*

The Seventeenth Annual Meeting of the Bar Association of the State of Kansas, was called to order at 10:30 o'clock a. m. in the supreme court room, President C. C. Coleman in the chair.

The reading of the minutes of the last meeting was dispensed with.

The Executive Council by its Chairman, Silas W. Porter, reported to the Association the names of the following applicants for membership and recommended their election: W. T. Dillon, Belleville; Chas. L. Brown, Arkansas City; Isaac A. Rigby, Concordia; Wm. F. Sapp, Galena; B. T. Bullen, Belleville; H. F. Mason, Garden City; Louis H. Wulfekuhler, Leavenworth; E. S. Earhart, Kansas City.

This report of the Executive Council was unanimously adopted and the lawyers named were duly elected members of the Association.

Mr. Porter, chairman of the Council, continued his report orally, and in closing made the following motion:

"That a standing committee be appointed whose duty it shall be to secure an increase of membership."

Which motion was duly seconded and carried unanimously.

In due time said committee was named by the president as follows: A. Bergen, of Topeka, Chairman; A. H. Ellis, of Beloit; T. B. Wall, of Wichita.

The Memorial Committee, through John C. Postlethwaite, its chairman,

reported to the Association that since its last meeting, death had removed three of its most distinguished members, all prominent and highly respected lawyers of this state: Theo. A. Hurd, John B. Johnson and C. G. Foster, and as a part of its report, the committee presented a sketch of the life and a tribute to the memory of each of the deceased brothers.

On motion of E. W. Cunningham, seconded by P. P. Campbell and by standing vote, the report was received and ordered printed with the proceedings of the Association. Here follows such report:

## TO THE MEMBERS OF THE STATE BAR ASSOCIATION.

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*Mr. President and Gentlemen:*

As we are about to enter upon the deliberations of this, the seventeenth annual meeting of the State Bar Association, it is mete that we should bow our heads in humble submission to "Him who ruleth all things well," and in whose mighty hand abide the destinies of all men and of the world. And silently and reverently we recall the memory of those members of this Association who have answered the immutable decree of death, and who, passing through the shadow of the dark valley, have made their final appeal to the court of last resort on high, where an ever ready advocate sitteth at the right hand of God, the Father, as the only all-powerful mediator and intercessor to secure for them that cherished and merited judgment, "Well done, thou good and faithful servant; enter thou into the joy of thy Lord."

The summons was served upon three of our respected members. Death came to them in the evening of life, after the burden and heat of the day. The vigor of manhood had been devoted to the performance of duty as lawyers, judges, citizens and men, earnestly contributing to the advancement of civilization and the development of the state to the great benefit of this and succeeding generations. They worked, wrote and spake in the courts, in the councils of their fellow citizens, molding and shaping by their influence the destinies of all nations.

We pay them a tribute to their memory in the feeble words of this report; we record their names upon the death roll in token of the esteem and respect in which we held them while mingling in our deliberations. A grateful nation shows its appreciation of the services of its heroic dead by the beautiful custom of decorating the graves with floral offerings each returning spring time, not alone to keep fresh in our memories their noble deeds in time of war, but to instill into the hearts of coming generations

lessons of patriotism and love of country. So we, with subdued hearts and softening affections, pay a loving tribute to our dead that the records of this Association may testify to succeeding generations their many estimable virtues as exemplified in their long and useful lives, and serve as an inspiration to succeeding generations, influencing them to higher ambitions, nobler thoughts, purer lives and holier ideals.

"Earth's transitory things decay,  
Its pomps, its pleasures, pass away;  
But the sweet memory of the good  
Survives in the vicissitude.

So, through the ocean tide of years,  
The memory of the just appears;  
So, through the tempest and the gloom,  
The good man's virtues light the tomb."



### JUDGE THEODORE A. HURD.

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On the morning of February 22nd, 1899, the spirit of this distinguished and honored member of the State Bar Association answered the call of the Dark Angel of Death and left its earthly tenement.

Ripe in years, rich in experience, powerful in influence, almost eighty years of the century unfolded its pages of history during the life of Judge Hurd. He was born in Pawling, Dutchess county, New York, December 21st, 1819. Graduated in the class of 1847 of the law department of the University at Utica, N. Y., admitted to the bar the same year. He immediately engaged in the practice of his profession with B. Davis Noxon of Utica and later became the law partner of Judge Joshua A. Spencer, one of the eminent jurists and distinguished lawyers of the state of New York. He came to Kansas in 1859 and located in Leavenworth where he diligently pursued the practice of his profession, and by and through his influence as a lawyer, judge and citizen assisted in founding and building up a great commonwealth.

His ability as a lawyer was recognized at home and abroad and was in continual demand by large corporations and wealthy clients having important interests in the state. For years—from the building of the Kansas Pacific railroad and long after it was merged into the Union Pacific—Judge Hurd was its trusted attorney. His ability is also manifested in the able opinions written by him while occupying the exalted position of associate justice of the supreme court of the state of Kansas, which serve as a valuable contribution to the legal library of the state.

The Leavenworth Bar Association unanimously adopted the following resolution, which we are pleased to make a part of this record:

*Resolved*, That the sudden passing away of the Hon. T. A. Hurd arrests attention far and near and saddens the reflections of his associates. Never more sincerely than now has the bar of Leavenworth paid tribute to the memory of a deceased brother.

Distinguished for his probity, with unfailing courtesy, and free from the

asperities of the law, he won the good opinion of all who knew him. His diligence and assiduity were remarkable, commanding the respect of clients and acquaintances, and insured the professional success he signally deserved. In trial courts his familiarity with the practice, together with the polish that comes from association with the most accomplished lawyers of his day, taught lessons in grace, dignity and decorum to the younger members of the bar. He treated the court with just respect, cited industriously, and fairly applied the law. Before the courts of last resort his ripe attainments and well known character for candor and honest discrimination gave him audience and consideration second to none.

His appointment as associate justice of the supreme court of Kansas, and his services as such, met with universal approval.

Interested in the press of his city, he never countenanced carping criticism, personal bitterness, or partisan abuse. Grown familar to our citizens by uninterrupted attendance at his office and the courts for a period beyond the lot of most, he will long be missed and longer regretted by all. Obedient to duty, faithful to every trust, ever ready to counsel or advise, it is hard to realize that he is gone, yet—

“Will he obey when one commands?  
Or answer should you press his hands?  
He answers not, nor understands.”

## CAPTAIN JOHN B. JOHNSON.

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"His life was gentle; and the elements  
So mix'd in him, that nature might stand up,  
And say to all the world, 'This was a man.'"

Captain John B. Johnson yielded to the demands of the death messenger made upon him through a long and lingering illness. His light was extinguished May 18th, 1899.

He was born near Canton, Illinois, January 21st, 1842. He was educated in the common schools and Prairie City Academy from which he graduated in 1865. Nineteen years of his boyhood was spent in tilling the soil on his father's farm. When nineteen years old he enlisted as a private in Company A, 55th Regiment, Illinois volunteer infantry. He was promoted to second lieutenant of Company F for meritorious service at the battle of Shiloh. At the first volley on the morning of the 6th of April the ranking commissioned officers were all killed or wounded, leaving the command of the company to Lieutenant Johnson. After the battle he was made captain of the company by order of the colonel, at the unanimous request of the thirty-two men left out of the ninety-eight who went into the fight. He resigned his commission in the spring of 1868 on account of sickness, from which he soon recovered, and the following summer he recruited a company, was elected captain and attached to the 187th Illinois volunteer infantry, rendering excellent and valiant service until the close of the war. He participated in the battles of Shiloh, Corinth, Vicksburg, Fort Henry, Donaldson and nearly all other battles of the army of the west.

He came to Kansas in September, 1865, locating in Oskaloosa, Jefferson county, where he engaged in the practice of law until 1877, when he came to Topeka and became a member of the law firm of Peck, Ryan & Johnson until 1881. He established a fine reputation as an able and successful criminal lawyer, and of marked ability in the civil practice. His sterling qualities as a public servant were recognized by the constant and almost continuous calls of an admiring constituency to serve them in offices of trust.

Captain Johnson was elected to the legislature in 1867, re-elected in 1868, and made speaker pro tem, nominated and elected presidential elector in 1876. He made the campaign of the state and was the chosen messenger to make the returns of the vote of Kansas to Washington. Always active in politics, a delegate to almost every Republican convention held in Jefferson county during his residence, chairman of the Republican state central committee in 1880, again chosen by the people to represent them in the legislature, he was the honored speaker of that body in 1881 and again in 1885. He was appointed by Governor Humphrey judge of the Shawnee county circuit court. This appointment received the endorsement of the members of the bar without regard to politics. He resigned this office in 1894 and was called by the United States Federal Court to act as special master in the Santa Fe foreclosure proceedings. Soon after the completion of the duties imposed upon him by the Federal Court his health began to fail and the last few years of his life were spent in the quietude of his family awaiting the summons.

Captain Johnson was a lawyer of leading rank in the state; a fine conversationalist; an excellent after dinner orator; a forcible campaign speaker; a veteran of the civil war and a member of the Loyal Legion; honored and respected by his comrades, fellow citizens and the legal profession.

"How fast they fall—those we have known,  
As leaves from Autumn branches blown  
So quickly sear!  
Yet, one by one they drop away,  
As withered leaves that fall and stray  
And disappear."

### JUDGE CASSIUS G. FOSTER.

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Another distinguished lawyer passed into the "great beyond," Judge Cassius G. Foster, who presided in the Federal Court for a quarter of a century. The records of the United States Courts are a monument to his ability as a lawyer and a fair and impartial judge.

Judge Foster was born at Webster, New York, on the 22nd day of January, 1837. He was reared on a farm until fourteen years of age, attended public school and later entered the academy at Adrian preparatory to a collegiate course, but upon the advice of an uncle gave up that purpose and entered immediately upon the study of the law, which he pursued diligently and was admitted to the bar in 1859 at the age of 22 years.

We desire that the attorneys associated with him professionally and socially as members of the bar of Shawnee county shall speak in these records by a reproduction of the resolutions passed by them at the time of his death. These resolutions are signed by two prominent members of the State Bar Association and are made a part of this record:

"Ours is the sad duty to announce to the court the death of the Honorable Cassius G. Foster, which occurred on the 21st day of June, 1899, at his home in the city of Topeka, in the midst of his family and friends.

"Judge Foster's long and distinguished services upon the bench and his long residence in this city make it fitting and appropriate that some notice and action shall be taken in this court in reference to his death. The court and the members of the bar of Shawnee county have not only had long and intimate relationship with Judge Foster as a judge upon the Federal bench, but they have also long been familiar with him as a friend and fellow citizen in this, the capitol city of the state. To those of us who have known him so long and so well, any commentary upon his life and character would be unnecessary, but we deem it proper that there should be enrolled upon the records of this court a brief and fitting memorial of his services as a judge, his ability as a lawyer, and his worth and probity as a citizen.

"Judge Foster came to the state of Kansas in the year 1859, just at the

close of what is familiarly known as the historic period in Kansas, when the cause of freedom had been won, in so far as it was made sure that the blight of slavery should not defile the virgin soil of Kansas. The struggle that had been going on here during the years preceding his coming had enlisted his deepest sympathy and attracted him to the territory to cast in his lot with the pioneers and to help in the glorious and inspiring work of building a new state upon the foundation of liberty, humanity and progress. He was deeply imbued with all the high ideals of those who had carried on the fight for freedom and those ideals became to him then and remained during his life deep seated convictions which ruled his conduct and for the vindication of which he was always capable of infinite sacrifice.

"In the community where he settled in Atchison he was soon recognized as one worthy in all ways of confidence and respect. From the first he was known to be both honest and fearless, and those who differed from him in the widest nevertheless entertained for him the highest regard. His probity of character, his industry as a lawyer and his fearlessness and resource as an advocate placed him among the foremost members of the bar in Kansas. The favor of his neighbors and friends and their confidence in him were shown by his election as mayor of his town, and state senator from his county. His election as congressman and United States senator had been widely discussed and favored and prophesied by the people throughout the state, when, in 1874, he was chosen as judge of the United States District Court for this district in succession to Judge Delahay, who had resigned. While his appointment to the bench withdrew him from all forms of political activity, it did not stifle his interest in public questions as a citizen, nor limit in any wise the freedom and frankness of his discussion of them, both in public and in private. His citizenship in Kansas, of which he was intensely proud, and his take and share in the history and welfare of her people were never by him permitted to be submerged in his relationship as a Federal judge. No one more than he upheld the dignity and rightful jurisdiction of the Federal tribunal, or more fearlessly vindicated its independence of judgment within the limits of that jurisdiction, but he was at the same time a strict constructionist of the powers of the Federal Court and decided all cases of doubt in favor of the jurisdiction of the state courts. He had been an earnest and intense advocate at the bar, but at once took his position as a fair and impartial judge upon the bench. His life was an industrious one. Every question presented to him involving nice and novel distinctions was industriously worked out to the end that the law at all times should be sustained and vindicated and justice accomplished.

"Several years ago a disease from which he had been a periodical sufferer nearly all his life, became fixed and chronic in his system so as to make him more or less an invalid and sufferer for the rest of his days. Those of us who were familiar with him can bear testimony to the patience and fortitude with which he bore physical weakness and intense pain for many

years, and to his constant and unremitting efforts to perform his full duty as a judge. The clearness of his judgment, and the vigor of his mind were in no wise affected by his illness, but remained to him undiminished to the end. In his relationship to his family and to his friends he was ever loyal and unwavering in his confidence and devotion. But he was a man of strong convictions and earnest but honest prejudices in matters disconnected from his duty as a judge and relating to public concerns. He never failed to publicly express his views in a forcible and vigorous way. His whole nature revolted against all forms of oppression and cruelty, and this passion for humanity took concrete form in the establishment in Topeka of the Humane Society which bears his name and will ever continue a monument to him. Upon the bench he was at all times patient and considerate, and especially so to young and inexperienced practitioners or to lawyers unfamiliar with the practice of that tribunal. No cause ever passed to judgment in his court without a full and patient hearing from both sides and without full opportunity to remedy any oversights and omissions which the neglect or inexperience of counsel might have caused. In administering the criminal branch of his jurisdiction he was sedulous in seeing that offenses were prosecuted, but merciful and humane in the punishment he inflicted.

"In his relations with his fellow men he was honest in the nicest sense and exacted as of right that he should be honestly dealt with by all. In brief, he was a good lawyer, an able and clean handed judge and an exemplary citizen.

"In conclusion your committee suggests that the court shall take a recess for the day as a testimonial of respect, and that this brief though inadequate memorial to the life and character of Judge Foster shall be spread upon the records of the court.

"JOHN W. DAY,

"T. F. GARVER,

"J. G. SLONECKER,

"W. H. ROSSINGTON."

A fitting tribute by those who knew him best. The record of his official life illumine the pages of the court journals. The memory of his private life as a citizen, lawyer and friend are engraved upon the memory of his associates. His acts of kindness and beneficence will be perpetuated by the Foster Humane Society.

Great death has entered our fold and plucked from our ranks these three distinguished members and transferred them from the court below to the court of Heaven. Though dead they still speak to us, as the agreeable reminiscences of our association with them deluge the mind with pleasant memories.

"Were a star quenched on high,  
For ages would its light,  
Still traveling downward from the sky,  
Shine on our mortal sight.  
So when a great man dies,  
For years beyond our ken,  
The light he leaves behind him lies  
Upon the paths of men."

Respectfully submitted,

J. C. POSTLETHWAITE,

O. L. MOORE,

Committee.



## REPORT OF SPECIAL COMMITTEE

---

J. T. Herrick of the special committee appointed two years ago, and continued last year to investigate the charges preferred against C. J. Peckham by Isaac G. Reed, made report in writing as follows:

*To the Bar Association of the State of Kansas:*

As a member of the committee appointed by this association to investigate the charges made against Col. C. J. Peckham by Isaac G. Reed in his communication to the association at its regular meeting in 1898, I beg leave to submit the following report:

The committee made several efforts to get together and make an investigation of the matter, but were unable to do so. Early in this month Isaac G. Reed was pardoned and released from the penitentiary. He came to Wellington, Kansas, and I requested him to prepare an affidavit setting out the facts with relation to the charges made against Colonel Peckham. He prepared such an affidavit and the same is hereto attached, marked "Exhibit A." About the time this affidavit was prepared I received a letter from Judge Wall enclosing a letter from Colonel Peckham requesting the committee to get a statement from Judge Reed. I immediately notified Colonel Peckham that if he would meet the committee at Wellington we would hear statements both from him and from Judge Reed and any other witnesses who could be produced. I notified Judge Wall and Mr. Bucher of the date of the meeting but neither of them could attend. Colonel Peckham came and I met him and Judge Reed and Mr. C. E. Elliott, and each of them made statements which they claimed to cover the facts in the case. The statement made by Judge Reed was substantially the same as that contained in the affidavit hereto attached. These facts were substantially corroborated by C. E. Elliott who was one of Judge Reed's attorneys at the trial. Colonel Peckham admitted the facts to be substantially as stated, but added that after some correspondence with Judge Reed's father he had been requested by him not to take any further steps toward obtaining a review of the case

in the Supreme Court. Both Judge Reed and Mr. Elliott stated that Colonel Peckham had never notified them of this fact until the meeting here. Colonel Peckham did not have the letters with him from Mr. Reed, Sr., nor copies of the letters which he had written to Mr. Reed, Sr., but said that he would send the letters to me by mail, which he has failed to do. Colonel Peckham made no claim that he had paid over or disposed of all of the money which had been left in his hands, and when asked by Mr. Elliott what he had done with the balance of the money he replied that that matter formed no part of the present investigation. Mr. C. E. Elliott was the principal attorney for Judge Reed in the trial of the case and Colonel Peckham was only called in to assist after the case was transferred to Cowley county for trial. I am of the opinion from the investigation I have made of the matter that Colonel Peckham's actions were unprofessional in that he was guilty of taking money belonging to his client and converting it to his own use without his client's consent.

Respectfully submitted,

JAMES T. HERRICK.

STATE OF KANSAS, }  
Sumner County. } ss.

I, Isaac G. Reed, of lawful age, being first duly sworn on oath, depose and say: My name is Isaac G. Reed. For about thirteen years prior to May 21st, 1892, I was a resident of Wellington, Kansas, and a practicing attorney at that place. On the last mentioned date I was arrested charged with murder in the first degree in causing the death of Isaac Hopper at said Wellington. At the September term, 1892, of the district court of Sumner county, I made application for a change of venue in said case against me and the case was sent to Cowley county, Kansas, for trial. After my application for a change of venue had been granted, but before I was taken to Cowley county, I received a letter from the firm of Peckham, Beckman & Peckham (a firm of attorneys at Winfield, Kansas, composed of Col. C. J. Peckham, J. V. Beckman and Ed. L. Peckham) written by Col. C. J. Peckham offering the services of said firm in defending me against said charge, which letter I have made search for but have been unable to find and am satisfied has been destroyed. I did not answer said letter but waited until I was taken to Cowley county and then had an interview with Col. C. J. Peckham in which, after explaining to him that I had already employed C. E. Elliott, Esq., of Wellington to act for me, and further telling him that I had not the means to suitably pay his firm for their services. He answered me that such services as he or other members of his firm should render would be wholly gratuitous and I then gratefully accepted the proffered services of his firm in my behalf.

I afterwards saw J. V. Beckman of said firm and he personally offered me his services in my defense without any fee therefor.

In January, 1898, I was placed on trial but through the sickness of a juror the jury was discharged and a mistrial had in the case. In the following April I was again placed on trial, which trial resulted in my conviction of murder in the second degree and my being sentenced to imprisonment in the state penitentiary for the period of twelve years. Col. Peckham, as one of my attorneys, said that in his opinion, such error had been committed in the trial of said case as would give me a new trial by the Supreme Court on appeal thereto, in which opinion my other attorneys concided. I accordingly made arrangements to, and did, appeal said case to the Supreme Court and was granted a new trial at the July session of said court in 1894. In the meantime on or about January 12th, 1894, I was released from imprisonment and was out on bail. To secure bondsmen on my bail bond, which had been fixed by the court at \$10,000.00, my father had deposited with the First National bank of Winfield, Kansas, the sum of \$5,000.00, as indemnity against loss on the part of said bank or its president, W. C. Robinson, by reason of signing said bail bonds.

In September, 1894, I was again placed on trial, which trial resulted in my conviction of murder in the first degree and my sentence as provided by law for such offense. After my last conviction Col. Peckham expressed himself very strongly in regard to the result of my trial, saying it was an outrage and that, in his opinion, the judgment was not sustained by the evidence and that he was satisfied a new trial would be again given me by the Supreme Court. But I had in the last trial and previous ones not only exhausted my own means but to a great extent those of such friends and relatives as could or would aid me, including those of my father. The money my father had placed on deposit as security for my bail, he had borrowed and had to repay. Col. Peckham knew these facts and the fact also that it would be well nigh impossible for me to raise the money necessary to pay the actual cost of an appeal. But he said to me, If you can possibly raise the money to pay the actual cost of transcribing the stenographer's notes to make the bill of exceptions and the cost of a transcript and other actual costs incident to an appeal that he would see that an appeal was perfected and the case presented to the Supreme Court without any fee for his own services in the matter. He also said he considered the judgment against me such an outrage that he thought it his duty, as a lawyer, to do all in his power to have the same reversed aside from his personal interest in myself, and for that reason also he would act without pay for his services in the matter. Accordingly I tried to and succeeded in raising the money to cover the actual costs incident to an appeal and presentation of the case in the Supreme Court, which sum by reason of the costs incident to the previous appeal, we fixed at \$800.00. This sum of eight hundred dollars was obtained from my father in this way: After my last conviction I was taken into custody by the sheriff and

confined in jail, and of the \$5,000.00 on deposit as security to my bondsmen, as aforesaid my father withdrew \$4,200.00, leaving \$800.00 on deposit in said bank to be applied to the payment of the costs of my appeal, as agreed upon in the conversation above narrated between Col. Peckham and myself. Pursuant to said agreement in regard to an appeal, Col. Peckham and myself directed the stenographer, R. S. Cook, Esq., to transcribe his notes and make such copies of exhibits as were necessary and to do the other work needed in making a bill of exceptions in the case. Owing to the large amount of evidence and the fact that he soon had to attend court in another county, it was expected that it would be about six weeks before the stenographer could complete such bill of exceptions. It was also expected that I would remain in the jail at Winfield until such bill of exceptions was made and my appeal perfected. But after such order to the stenographer had been given, the sheriff decided to take me to the penitentiary, and I was accordingly removed from Winfield on the evening of October 4, 1894, and arrived at the penitentiary on the morning of October 5, 1894. When I was taken from Winfield, Col. Peckham met me at the depot in said city and went on the cars with me as far as Moline, Kan. And in our conversation then he told me to keep up good courage, that in six or eight weeks, at most, Mr. Cook would have the bill of exceptions ready and he (Col. Peckham) would have my appeal perfected and an order made by the Supreme Court directing my return to the jail at Winfield, pending the hearing of my appeal in the Supreme Court. After my incarceration in the penitentiary, I heard nothing from Col. Peckham for nearly two years, although I sent word to him through Ben S. Henderson, J. V. Beckman, C. E. Elliott and others urging him to act according to our understanding and agreement in regard to my appeal. Finally in September or October 1896, Col. Peckham called to see me at the penitentiary and in the interview I then had with him, he said he had drawn and used for his own use the money that had been deposited to pay the costs of my appeal. He gave as an excuse for so doing that his wife had been sick and had died, and that he needed money and said he thought he could replace it before it was needed, but had not been able to do so, except enough to have the bill of exceptions completed, allowed, settled, signed and filed, which amount he claimed to be about \$350 and said he still had \$450 to pay the cost of a transcript. At this time he gave various reasons why he had not perfected my appeal as we had agreed upon. One of them being that a law had been passed changing the boundaries of certain judicial districts, taking Cowley county out of the district wherein A. M. Jackson was judge, who was the trial judge in my case, and that he did not want to perfect the appeal until the law went into effect so that if a new trial was granted by the Supreme Court it would not again be tried before A. M. Jackson as judge. At that interview he told me that he would immediately upon his return to Winfield, perfect my appeal and prepare brief and

take such steps as were necessary for the proper presentation of the case in the Supreme Court.

I have never seen or heard from him since, although I wrote to him again urging him to perfect my appeal or to pay over the money in his hands to R. S. Cook or some one else who would act in the premises for me in perfecting my appeal.

When I wrote to the members of the Kansas State Bar Association in January, 1897, stating some of the facts in regard to the treatment I had received, I had no intention of making charges or starting an investigation against Col. Peckham. And I have no desire to pursue him now. My idea in writing said letter was to bring to the attention of my brother lawyers the fact that I had been deprived of the right of appeal. And for them to investigate the matter with the view of determining whether or not I had lost anything thereby. In other words to determine whether or not the Supreme Court would have given me a new trial. If they became satisfied I would have received a new trial then it seemed to me they would think it proper to urge the Governor to pardon me and give me that freedom which I would probably have gained on a retrial of the case.

And further deponent saith not.

ISAAC G. REED.

Subscribed and sworn to before me this 9th day January, A. D., 1900.

MORA BARNES, Notary Public.

[SEAL]

My commission expires Nov. 28, 1903.

Thereupon after discussion participated in by Messrs. Cunningham, Garver, Parker, Pringle, Cowles, Wells and Loomis, T. F. Garver offered the following motion:

"That the judiciary committee be instructed to formulate charges against C. J. Peckham as a member of this association, based upon the matters embodied in the report of a special committee regarding complaint of Isaac G. Reed against C. J. Peckham. That a copy of such charges be served upon Mr. Peckham, and hearing of the same had by the committee and a report of its conclusions and recommendations be made to the next meeting of the association. A copy of such report to be furnished to said Peckham prior to such meeting."

Carried.

It appearing that inadvertantly the name of Leslie F. Randolph, who was chosen a member of this association last year was omitted at that time from the proper list, on motion of J. T. Herrick, it was ordered that said mistake be corrected and said Randolph be declared properly and duly elected.

Adjourned to 2 o'clock p. m.

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JANUARY 30, 1900, AFTERNOON SESSION.

On motion of W. T. Dillon, it was ordered that a committee of seven on nominations be appointed at this time, which committee was named by the chairman as follows: W. T. Dillon, T. N. Sedgwick, A. Wells, M. M. Miller, E. W. Cunningham, N. H. Loomis, and Louis H. Wulfekuhler.

L. H. Perkins, chairman of the committee on legal education and State University law school, read the report of his committee, following, which same was received and ordered to be made a part of the proceedings of this meeting:

### REPORT OF THE COMMITTEE ON LEGAL EDUCATION AND STATE UNIVERSITY LAW SCHOOL.

This intense and practical age demands action; and action trenches upon thought and curtails the time for reflection. This has elements of good, and makes for a great and powerful personality in the citizen and the State; but it is fatal to the broad and deep development of profound scholarship, which does not thrive on a bounding pulse and a throbbing brain, but demands repose and mental equipoise.

The youth who would one day shine in our profession must learn to make haste slowly, and aspire to something better than a dash of the Statutes, a cow case, and a handy way with Spaulding's valuable Treatise.

We have enough ignorant, ill-bred, half-baked lawyers now. Any supply exceeds the demand. There is no practical way to get rid of them. They are not criminals within the form of the statute; and a long-suffering community hesitates to hang a lawyer because he is an ass. Many a lawyer, who never came to see, asks what the State Bar Association is for, and what money is to be made out of it.

Our President, in his clear and classic style has said: "It is to extend acquaintance, promote good fellowship, and encourage observance of the best ethics of the profession." That is good; and it is true. But your Committee, while recognizing this association as the Keeper of the Conscience, further says that it must also be the custodian of the measure of scholarship, in the profession.

There is too much haste in the preparation. One would suppose by the rush and whirl of young men to get into the law that the old guard had been captured by the Boers, and but for the timely arrival of recruits the whole machine would run down and the world go to the powwows.

The youth, who has attained majority and turns him to the law, inhales

the virus with the vital air. He scents the battle. With head aloft and airy step he scorns the feeble foe. Make haste! his motto. He knows no fear. He aches with strength.

And well it is that it is so. He'll need it all before the battle's done.

Your Committee does not under-estimate the great value of this Association in holding up the standard of professional ethics, or its power in many other ways; but in no way can it exercise so powerful and far reaching an influence as by elevating the standard of scholarship, and requiring fitness and equipment before admission to the bar. There is no reason why admission to the bar, without due preparation, should be made a handy stepping-stone for entrance to other vocations. By this your Committee does not mean that a thorough study of the principles of the law, leading up to a university degree, and even admission to the bar, may not be most excellent preliminary training for any profession or occupation. But there is no apparent reason either in the derth of lawyers, or the lack of aspirants, for cheapening the standard of the profession by an open door for all comers.

Nearly all the states around us, and many others, have enacted stringent laws upon this subject. Kansas may very likely be the last State in the Union to wake up to the screaming farce of an examination for admission to the bar, by a committee of lawyers in our District Courts. When all other states have outgrown this kindergarten school of daubs and patchwork the flunkies from all over the country will come to Kansas, get admitted to the bar and then go to the Legislature and get up a lawyer's trust, and secure the passage of a law requiring an examination, before a committee of their own, of all lawyers who have practiced over five years and exclude them and new candidates altogether.

The first recommendation of your Committee is that the President of this Association be requested and directed to appoint a committee of five to draft a suitable bill regulating examinations and admissions to the bar, and cause the same to be introduced at the next session of the Legislature.

There has been a great change in sentiment during the last twenty-five years on the subject of legal education, and how it is best acquired. We borrowed from our English brethren the essential elements of student training in the law office, but we lost much of the power of the old system by dropping the articles of agreement between lawyer and student which are universally made in England. A boy entering an old, established law office in this country, begins to wonder what he is going to be paid; while in London he pays two hundred pounds article fees, and gives his whole time to his preceptor for several years. We have outstripped Great Britain in average scholarship in the profession, and this is largely due to the general establishment of law schools in this country, and the growing opinion that they afford a better preparation, and superior advantages for the study of the law.

The eminent lawyer can ill afford to give the necessary time and attention to a student, and is apt to use him for an errand boy, and turn him loose to browse at random in an unknown wilderness of books. Practical knowledge will have to come largely from the office, but there is time enough for that, when the foundations have been laid broad and deep.

In short the verdict of those best qualified to judge is that law schools are now a necessity; and the state that fails to recognize the fact, must either send her sons abroad, or see them fall below the superior attainments of those who have had the advantage of training in well equipped schools of law.

Kansas is fortunate in having made early provision for this need. It is now twenty-two years since the Infant Law School began its feeble and uncertain struggle. One member of your Committee was present at the birth and is apt to grow reminiscent on occasions.

The struggles of the infant law school during all those early years, when practically no assistance was had from the legislature, are known to few outside of Lawrence, and are so far eclipsed by the rapid growth of recent years that they will soon be forgotten.

Instead of the ideal relation of the school of law as a professional, finishing school, into which graduates of the School of Arts should advance on their entrance, it was for years considered by the undergraduates of the School of Arts that they were head, shoulders and waist-band above the students of the Law School; and only within the past two or three years have the alumni of the School of Arts begun to realize that this is not a little college but a great University with many departments, and that a graduate of any school is an alumnus of the University.

This abnormal condition had just enough truth behind it to keep it alive for a long time. Here was a course of two years, while the Arts course was four. There was always danger that young men would turn to the Law School as the shortest and cheapest road to a University degree. The Law School was fighting for existence, and there was power in numbers. If the requirements were made too high it would reduce attendance. Then there was a close corporation called the Alumni Association, which was a misnomer because it was in reality an oligarchy, comprising the graduates of the School of Arts and one or two other schools, but excluding all others from its sacred precincts. This oligarchy did not like the kidney of the law boys; and the esteem was mutual.

It was freely charged that when a boy failed to pass the grades into the high school, he would make a bold dash for the Law School, and in two years flaunt a University sheep skin in their face.

Justly or unjustly it came to be a settled fact that whatever the certificate of graduation from the Law School might signify among lawyers it counted very little among scholars.



This did not hinder some of the finest men on earth from matriculating at the Law School. It did not hinder many graduates of the School of Arts and other colleges from pursuing their legal studies there. But it has taken a long time to convince the Oligarchy and the Faculty and the Regents and the Legislature that the Law School is really a great and legitimate part of the University, and that it must be fostered and encouraged and supported by money and teachers, so that its standard shall be equal to that of any other department, and its certificate of graduation be held in as high esteem among scholars as the diploma of the School of Arts.

For fifteen years this struggle for a higher standard of scholarship in the Law School has been going on, and now it is bearing fruit. The School seems destined soon to fill the place that educated men expect and require of a great co-ordinate branch of the University, which should begin where the School of Arts leaves off. Preparation for admission to the bar should begin in the Grades, progress through the High School, then through the College and finally through the School of Law. This represents eight years in the Grades, four in the High School, four in College, and three in the Law School, nineteen in all, which would call the young man to the bar at the age of twenty-five; and who among us will say that is not young enough with such a preparation.

On the 19th inst. your Committee at the call of the Chairman met in Lawrence and visited the Law School. Two members were unavoidably detained but the others took the work in hand, visited the classes to see the School in operation, inspected the library and the quarters and accommodations of the School. They also gathered a large fund of information from the Chancellor, and the Dean and Faculty of the Law School. Having previously gathered catalogues of Columbia law school, Yale, Harvard, Michigan and others, they devoted what time was available to a careful comparison and analysis of the work now being done by the State University Law School, and are pleased to report that the work of the School is of a high order and bears a favorable comparison with the standard of those older and greater schools. Your Committee is greatly pleased to report that the School enters this year upon a new era, having added a third year to the course. The Junior Class which has now entered for the three years course is one of the largest in the history of the School, and it is plain that with three classes instead of two as heretofore, the attendance is likely to increase from about one hundred and fifty to over two hundred and twenty-five, without counting the regular annual increase. Hence, within the next three years, quarters will have to be provided for about two hundred and fifty students. The quarters in Frazer Hall are wholly inadequate for the present attendance, and the State must suitably house this great and growing School.

The second recommendation of your Committee is that the next building at the University be for the Law School, and that the next legislature appropriate the sum of \$80,000 for such building and equipment.

Your Committee found but one set of Kansas Supreme Court and Courts of Appeals reports, and but one copy of the last edition of the General Statutes. Imagine one hundred and fifty lawyers trying to consult one book! It is therefore recommended that the Executive Council deposit with the Law School four complete sets of Supreme Court and Courts of Appeals, reports and four copies of the General Statutes.

It is also recommended that the members of this Association urge their representatives in the legislature to make a separate and distinct appropriation of \$10,000 for the library of the Law School, which is wholly inadequate and bears no sort of comparison with the libraries of first-class Law Schools.

Your Committee was especially interested in a practical feature lately introduced in the School, by which an hour in the afternoon each week is given to the consideration of practical things that engage a lawyer in his everyday work. For example: A Justice of the Peace explains to the class the practical workings of his office, his records, dockets and procedure. The Police Judge and City Attorney unravel the mysteries of the Police Court. The Probate Judge shows them how to get married, and how to complicate their estates for the benefit of the craft. The Clerk of the Court, Register of Deeds and other officials lecture to the class in their specialties. The County Attorney on the functions of that office. And various lawyers, by special request, have taken the class through an appeal from the Justice's Court; an actual case in the District Court, and a Case Made for the Supreme Court. All this has been outside of regular hours and prescribed work; has been exceedingly entertaining to the class, and must necessarily give them quite an insight into the various matters considered.

Like Cook's personally conducted tours it condenses a vast amount of information into a very small compass, is altogether an unique idea, and has been skillfully carried out.

The most important and far-reaching recommendation of your Committee relates to the creation of a new optional course to be wrought out by the Faculties of the Schools of Arts and of Law. When a student who has set his heart upon the law, has attained the Sophomore year in the regular Arts Course, there are many studies leading up to the requirements of a legal education that would be just as serviceable for mind training and general culture as those now prescribed in classical courses. A judicious blending of such studies with those to be selected from the Arts Course would lead to the degree of Bachelor of Arts at the end of four years from matriculation. Pursuing the combination course further the student would receive the degree of Bachelor of Laws at the end of the fifth year: and at the completion of the whole course of six years the two degrees of Master of Arts and Master of Laws.

Your Committee would most earnestly recommend that no student who did not hold a degree equivalent to Bachelor of Arts from the University or

other accredited institution, be accepted as a candidate for the degree of Master of Laws at the completion of the proposed optional course in order that such a diploma from the Law School may carry the evidence of general culture and scholarly training outside of the technical work of a law school. Such a combination course of six years, framed for a special purpose, and developed and matured by experience, would prove of inestimable value to the student, and might serve to unite more closely those two great departments of the University.

The usual duty of selecting the most meritorious paper from among those presented by the contesting candidates of the Senior Class devolved upon the Committee. The papers were carefully graded by the whole Committee, and the honors were not all with the victor. Several of the papers would do credit to any institution.

The time has come when there is no longer any rivalry between the country law office and the state University Law School. It would be well for the law to require at least three years study before admission to the bar; but, whether it does or no, the Law School will continue to grow and overflow with ambitious young men and women, who will refuse to be persuaded that urbanity and scholarship and culture count for nothing among the attainments of a successful lawyer.

The value and work of the Law School is no longer to be tested by numbers. It can make its standard equal to the highest and still have numbers enough.

Let us give it all possible countenance, encouragement and support, and in the coming years these halls will shine with its light, and it will repay tenfold honors to the State Bar Association of Kansas.

L. H. PERKINS,  
SILAS PORTER,  
W. F. GUTHRIE,  
B. F. MILTON,  
W. S. ROARK.

Referring to the above report, E. W. Cunningham offered the following motion, which was duly seconded and carried:

That the recommendation of the Committee that a committee to prepare and present to the approaching Legislature a bill providing for a more satisfactory method for admission to the Bar be approved, and that such Committee be appointed by the President of this association, and that the other recommendations contained in said report be approved.

The President in due time named the following gentlemen to constitute such committee: E. W. Cunningham, L. H. Perkins, J. D. McFarland.

H. F. Pownall, of Thayer, Kansas, representing the State University Law School, delivered an address on, "The Constitutional Right of Congress to Refuse a Seat to a Member Elect, Who Presents a Valid Certificate of Election." This was the most meritorious of the papers prepared by the Senior Class of the Law School in contest for the honor, and will be found in its proper place following these Minutes.

Clad Hamilton delivered an address on, "The Military Law." No manuscript of this address having been furnished the Secretary, it is necessarily omitted.

The Judiciary Committee through its Chairman, T. F. Garver, submitted the following report, which was received by the Association and ordered to be made a part of the record of its proceedings.

### REPORT OF JUDICIARY COMMITTEE.

*Mr. President and Gentlemen of the State Bar Association:*

Your committee has been at no loss for subjects worthy of consideration; but have been somewhat deterred from making any elaborate report or urging upon you any special matters, from the fact that the history of this Association has a tendency to make one think that the reports of this committee are regarded as a source of entertainment rather than as suggesting lines of practical work and improvement. We content ourselves, therefore, in calling attention to a few things that have fallen under our observation that appear to be entitled to more than a mere passing notice. The effectiveness of any bar association for substantial good to the law and lawyers, depends largely upon the practical efforts put forth by the members for the accomplishment of needed changes and reforms in the law. That which we agree to and wish for today, ought to be sought after tomorrow, and not waited for, as we wait for ripening apples to drop into our laps as they are loosened by the autumn winds.

The subject of more than ordinary concern at this time is the proposed amendment to the Constitution of the State, whereby the number of the judges of the Supreme Court may be increased from three to seven. Probably not less than nineteen-twentieths of the lawyers of the state realize the importance of securing the adoption of this amendment, and are heartily in favor of it. They are not satisfied with their experience with an Appellate Court intermediate between the Supreme Court and the district courts. Every suitor feels that he is entitled to the best there is; and when he is met with an adverse decision, he wants the privilege of having it so recorded by the court of last resort—and wants that as a matter of right.

The present judicial system was created and accepted as a temporary make-shift. It has served its purpose well enough, but Kansas needs and should have something better. This association put itself on record concerning this matter, at its last meeting, in unmistakable terms; and through the efforts of the association the necessity for the proposed amendment was shown to the legislature and the passage of the resolution secured. Without such effort, it is probable the legislature would have done nothing, simply from lack of interest. So it will be when the question comes before the people. If the lawyers and judges of the state do not make this their special business and concern, explaining to the people the merits of the proposed amendment, it will fail. Unfortunately for so worthy a cause, a presidential election will be on at the same time, absorbing public attention and overshadowing other interests. Above all, this proposition must be kept above and entirely clear of partisan politics. Let it be well understood that in this we occupy a common platform, working together for the public good. To this end your committee suggests the appointment of a committee whose duty it shall be to have the interests of this amendment in hand and to use every honorable and reasonable effort to secure its adoption at the next general election.

Your committee has had its attention called to the fact that in a number of counties in this state persons have been elected to the office of county attorney who had no knowledge of law and were not even admitted to the bar. The result, necessarily, has been that the public interests have suffered and the business of the courts has been greatly impeded, especially in criminal cases. The duties of that office are too important to allow such a condition to exist. A law should be enacted providing for other qualifications for a county attorney than merely that he be an elector of the county.

Doubtless most of you have been caught up, or have tried to catch up the other fellow, in appeals to the Supreme Court, because some one was not made a party to the proceedings in error, who is held to be a necessary party. Very likely, the omitted individual was one who had not sufficient interest in the outcome of the case to even make an appearance in the lower court. He may have had some kind of nominal interest, to conclude which it was necessary to give him his day in court—at least to make proffer of a day. But he rejected your overtures for a controversy with him, saying he would not magnify the importance of your case by joining issue with you. In such a case, what should be done with him when you seek a review of a real controversy you have had with another party? Under the prevailing practice and decisions, he must be made a party in the Appellate Court, if the reversal of the judgment might in any way affect his status as established by the judgment appealed from. It is often a matter of serious inconvenience to get service on such person, both in preparing the case for the appeal and after the appeal has been taken. The issues and whole controversy are

entirely between the other persons. In such cases, should not either of the parties to a controversy be given the right to a review of the trial of the issues joined between him and the prevailing party, without regard to other parties who were in default, or who had no part in the issues tried? We suggest that a change could be made in the law, in this respect, in furtherance of justice.

The Court of Appeals, Southern Department, has recently decided that an appeal cannot be taken in habeas corpus proceedings. The Supreme Court has entertained such appeals, but without the question of jurisdiction being raised or decided. We see no reason why judgments in such cases should not be subject to review the same as in other cases. If the statutes are not broad enough to include appeals from final judgments in habeas corpus, the law should be made plain in favor of such appeal. The Supreme Court has held that the decision of the court in habeas corpus is a final judgment. Whether such judgment be for the discharge or detention of the petitioner, it, in either case, if erroneous, may work great wrong and injustice to some one of the parties concerned. All rights would be fully protected by an appeal and review.

Some of you have had experience with the law of 1897 by which the legislature deprived judges, at chambers, of the power to punish for indirect contempt, and curtailed, or attempted to curtail, the inherent powers of courts to do so. For what is called indirect contempt, the guilty party is, by the statute, entitled to have a trial by jury. No matter how flagrant may be the violation of the orders of the court, nor how defiant the disregard of legal process, the judge is powerless, and the court nearly so, to afford any speedy redress to the wronged party. Such legislation is of a questionable character. It was enacted because it was believed that some judges—notably federal judges—had punished for contempt, not committed in the presence of the judge or court, when there was, in fact, no facts to justify such decision. But, so far as our state judges and courts are concerned, it can be truthfully said that there has been no abuse of this power. There has, of course, been error in the disposition of such cases, but not more than in any other class of cases. As a rule, our judges are slow to exercise this power, and, when exercised, great leniency has been shown. At the same time, there are often cases when injustice is done by reason of the judge not being able to enforce the orders he has made. Take the case of an order to pay alimony, where the entire beneficial results of the order may depend on prompt obedience. The court is at vacation; the hands of the judge are tied; and when court does convene there is the delay, expense and annoyance of a jury trial. A threatened trespass is enjoined; the order is ignored by a party who proceeds to the destruction of valuable property for which compensation cannot be made. If the court is not in session, the destruction goes forward uninterruptedly. Is not the law of 1897 a step in the wrong

direction? Have we cause for such a show of lack of confidence in our judges as is made when we put manacles on their hands.

There is room for grave doubt whether this attempt, on the part of the legislative department of the government, to weaken the powers of the courts and judges to enforce their orders and judgments, is in furtherance of justice. Exceptional cases may, and doubtless do, arise when the judiciary could, to advantage, be held in check; but legislation of this character should be framed to meet general conditions and to serve the general good. A bad general rule should not be established in order to meet the needs of an exceptional case.

There are other subjects of interest and importance to which attention might be directed; but let this suffice for present consideration. That which we have here alluded to, has been briefly and imperfectly treated, more by way of suggestion than otherwise, and with the hope that actions may follow words until desired results shall be secured.

Respectfully submitted,

T. F. GARVER,  
LEE MONROE,  
A. M. HARVEY.

"The Status of the Prisoners in the State Penitentiary, under Death Sentence," was the title of a paper prepared by A. G. Otis, of Kansas City, and read by E. S. Earhart of the same city, the same appearing in its proper place in these proceedings.

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JANUARY, 30, EVENING SESSION.

President C. C. Coleman, delivered the president's annual address, subject, "The Evolution of a World Power," the same appearing hereafter.

Hon. O. H. Dean, of Kansas City, Mo., delivered an address on "The Development of the corporation."

On motion of John Martin, the Association unanimously tendered to Mr. Dean its thanks for his able and entertaining address, and ordered the same printed in the Bar Proceedings for the year 1900.

The Association adjourned till to-morrow morning at 9:30 o'clock.

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JANUARY 31. MORNING SESSION.

Association met promptly on time, about one hundred lawyers present.

The Executive Council, by President Porter, reported to the Association the names of the following applicants for membership and recommended their election: M. P. Simpson, McPherson; David Ritchie, Salina; Edwin A. McAnany, Kansas City.

The report of the Executive Council was adopted, and the lawyers named were duly elected members of the Association.

L. H. Perkins offered the following resolution and moved its adoption, the motion being seconded by A. Wells.

**RESOLVED**, That the President of this Association do now at this Session appoint a strictly non-partisan Committee composed of two members from each Judicial District of the State, who shall not belong to the same political party, whose duty it shall be to use all honorable means to secure the adoption of the Constitutional Amendment, increasing to seven the number of the members of the Supreme Court.

Mr. Cunningham moved to amend by making the Committee contemplated in the Resolution, five members instead of two, from each Judicial District, to have entire charge of the Supreme Court Amendment.

Mr. Garver further amended by making the number nine instead of five, suggesting S. H. Allen as Chairman of the Committee, further appointment to be made by the President of this Association after consultation with Mr. Allen, which amendment to the Amendment was accepted by Mr. Cunningham.

The subject was discussed by Messrs. Bird, Loomis, Milliken, Herrick, Dillon, Jones, Stackpole, Osborne, Bullen, Milton and Allen.

On vote, the amendment was adopted. The Resolution as amended then carried unanimously.

Mr. Stackpole moved the appropriation of \$100.00 from the Treasury of this Association for the use of this last named Committee.

Mr. Garver moved to amend by making the amount \$250.00, or so much thereof as may be necessary.

Mr. Cunningham moved to amend the amendment, that the Association now proceed to take up a collection for the purpose indicated.

Following discussion by Messrs. Loomis, Herrick, Monroe and others, Mr. Bird moved that this whole matter of finance be referred to the committee heretofore provided for, which motion prevailed.

J. W. Parker delivered an address on "Kansas Probate Courts."

On motion of David Martin a special vote of thanks was tendered Mr. Parker for the paper just read, and Mr. Parker requested to furnish a copy of the same for publication.

Mr. Garver moved that the Committee on Amendments to Laws be requested to examine suggestions made in the several papers read before this Association, and thereafter take proper and necessary steps to procure legislation with reference to the same, so far as such suggestions meet the approval of the committee.

Mr. David Martin moved the appropriation of \$100 to the use of the



committee which shall have under its control the Supreme Court amendment; seconded by Mr. Milliken.

Then followed general discussion, which resulted in a motion by Mr. Slonecker to lay the whole subject on the table.

Motion to table lost. Original motion carried.

Association adjourned to 2 o'clock.

#### JANUARY 31, AFTERNOON SESSION.

L. H. Perkins reported to the Association the names of H. L. Burgess, Olathe, and Wm. E. Higgins, Lawrence, and recommended their election. The report was adopted and the lawyers named were duly declared elected members of the Association.

The Committee on Amendments to Law presented the following report through J. D. Milliken second on said committee:

### AMENDMENT OF LAWS.

#### Report of Certain Members of the Committee.

The undersigned members of the Committee on Amendment of Laws respectfully report that their chairman is unable to be present owing to sickness in his family, and the duty of presenting reports of the committee devolves upon those members who are present.

The chairman did not call the committee together during the year and so far as is known, did not have any communication with any member thereof during the year in relation to its duties, hence the committee as such has no report to make.

The chairman did, however, prepare a paper which was forwarded to the President of the Association with suggestion that "it be submitted to the committee and that they make such additions as they desire, but if the paper is used, I do not want anything cut out." This communication was dated the 29th, and came into our hands at a late hour upon that date (yesterday).

The paper has been casually examined, and while we indorse a portion of it we are unable to do so in its entirety, hence do not subscribe to or otherwise indorse the same as a whole, but present the same on behalf of our chairman as an expression of his individual views.

We desire to say that the members of the committee making this report individually entertain views that many important suggestions as to amendment of laws should be made, but under existing conditions as to the committee it is manifest that we could not present a report that would be creditable to ourselves or valuable to the Association.

Indeed, the importance of the work assigned to this committee is great, and to no source should the people have a better right to look for some practical suggestions for relief from the passage of bad laws or from the in-

considerate passage of good laws, that by reason thereof are nullified, than to this body

We, however, think that legislation should be developed into a science and that those who have at least some knowledge of legislation as a science, should be entrusted with matters involving such important interests.

J. W. GREEN,  
R. W. TURNER,  
JOHN D. MILLIKEN,  
Of Committee.

### AMENDMENTS TO LAWS.

This subject contemplates a careful study of the laws of this state as applied to the present needs of our people. The man who can point out the proper amendment to our laws, and then induce some legislature to adopt his suggestions will confer a lasting benefit on his race, and be entitled to a seat in the high places, among the councils of the righteous.

The writer does not claim to be able to point out all the amendments that ought to be made, much less to be able to secure favorable action on those which he suggests.

A careful study of the statutes of Kansas presents many curious things to the enquiring mind, and if one could visit the waste basket of the legislature and see the thousands of bills that various ambitious statesmen have thought ought to be enacted into law, he would wonder that we don't have more worthless and frivolous laws enacted than we have. The tendency of the age is too much law. The teaching of the orators and largely of the press of the west has been in the direction of more laws. In fact many people have come to the conclusion that all the failures and wrecks of life, and all the ills of mankind, can be alleviated by the enactment of new laws, or by judicious amendments to those already enacted. This is a delusion. Most of the burdens of life are of our own making, and would exist the same if laws were different. Some very ordinary man is elected to the state legislature and he at once imagines himself the especial guardian of all the rules of his neighbor's life and conduct. He at once sets him down to write bill- and frame laws, that are to reform and remodel society. He builds railroads, factories, and projects vast enterprises, regulates the moral conduct of his neighbors, and prescribes rules for commerce and trade, all with his pen. He learned early in his lessons in statecraft, that all acts of the legislature must commence with: "Be it enacted by the Legislature of the State of Kansas," so you will find this as the heading of each of his bills. It is about the only part of the entire bill that he feels sure is right, so he never misses that. But when one after another of his bills are reported unfavorable from the committee, or dies in the pigeon holes, or has the enacting clause stricken

out by a cruel majority.—Like the rich young man who visited the Saviour, he turns away sorrowful.

The legislature of Kansas has produced some wonderfully active men in the matter of manufacturing laws. In the last legislature 1,886 bills were introduced of which number more than 1,000 fell by the wayside, for which let us give thanks.

We think that a few laws well enforced and respected by our people are much better than a vast multiplicity of laws for which the people have little regard. Indeed people have come to regard anything as right that is not absolutely prohibited by law and that prohibition followed by a penalty.

For instance, a lady would have been shocked if some one had suggested that she would steal. And when her neighbor's chickens came into her yard she contented herself with driving them out and remonstrating with her neighbor. But when some one told her that chickens were the same as other wild animals when out of the owner's yard, she killed and ate them, thinking if there was no law to punish, there was no wrong in taking her neighbor's property.

At the close of the session of 1889 there had been twenty-three regular sessions of the Kansas legislature. These left to the people of the state a legacy of 7,806 laws, since then we have had five regular and one special session. These have probably increased the number to about 8,000. Surely half this number of well written laws would be sufficient for the government of so intelligent a people as we have in Kansas. Many people attribute the multiplicity and crudeness of our laws to the short time allowed to a session of the legislature. This is only true in part. Much of the time is frittered away with special legislation, called among statesmen "private bills," and a member's success in securing votes for the passage of very important *general legislation*, often depends on his willingness to support these "private bills."

We can have some idea of the extent to which these special measures claim the attention of our legislature by examining the session laws. The session of 1895 enacted 886 laws, of these 260 were private bills, leaving only 108 of a general nature, and of this 108, forty were regular appropriation bills for the support of the various institutions and departments of the state government, leaving only fifty-eight of a truly general nature.

The legislature of 1897 made 280 laws, 142 of these were special laws, forty-seven were general appropriation laws, seventeen were entirely new, four repealed laws heretofore enacted, and the rest were amendments to laws already in force.

In ninety-five cases out of every hundred the persons who come to the legislature for special favors in the shape of laws, could, if their purposes were meritorious, secure them by legal tribunals already created. The time allotted to our legislature is undoubtedly too short, but if that august body

would give the attention to matters of general interest that it devotes to "private bills," there would certainly be an improvement.

The writer saw many important measures fail at the close of the last session of the Kansas legislature for want of time, but there was ample time for Miss Borer to get her name changed to Boyer and for Gee Whillikins to break into the list of pharmacists.

The great question of transportation has been agitated in Kansas for twenty years. Party platforms have been written, orators have orated, tons of literature have been distributed, unnumbered promises have been made, on this subject, but what has become of them all? As well ask me what has become of the snows that fell last winter; they served their purpose and are gone. The legislative work of twenty years was swept away by the extra session of 1898. Our people left the old land marks and embarked on unknown and untried seas. The result is, that we have never been so completely at the mercy of those who control the lines of transportation as we are now. We suggest the enactment of a new law patterned after that of 1897.

There is great agitation going on at this time over the subject of trusts. Hundreds of amendments to laws and thousands of theories are being advanced. The trust is being denounced on all sides, but it flourishes like the palm trees of Lebanon. Yet the Farrelly law of 1897 is perhaps the best that has ever been enacted by any state legislature. One half of one feeble effort is all that has ever been made to enforce it, and since then it has been as dead as Julius Caesar. No one tries to enforce it though its provisions for that purpose are ample. Perhaps half the men who are orating and writing against trusts don't know that we have any law on the subject. The best we can suggest in the matter of trusts in Kansas, is an honest effort to enforce the laws already enacted. A test case will be a far better basis for suggesting amendments, than all the theories that can be advanced.

Again, there is the ever vexatious problem of taxation. A constant murmur and complaint comes up about the inequalities on our assessment rolls. That these irregularities exist, no one denies, but what is the remedy? One enthusiastic statesman thought at the last session of the legislature that he had solved the problem. He introduced a very simple bill on the subject. It requires each person, company or corporation to list all of its property at its full cash value. The committee on assessment and taxation said to him: "That's the law now." "Well, why is it not done that way?" the statesman replied. There was silence for the space of ten seconds; all knew why, but no one replied.

The reason is, that there is another law that permits it to be done the other way. The same legislature that ordained that all property shall be assessed at its true valuation in money, also provided that the township assessors shall meet at the county seat and fix the value at what they chose. The same

law that provides that each tax payer shall be sworn as to his schedule of property also provides that the affidavit shall not be conclusive on the assessor as to value, and further provides that the owner need not be sworn on the question of value. Bills have been introduced in every legislature since 1876 looking to the correction of this defect, but the end of the session comes too soon, a few more town sites have to be vacated, a few more school districts dissolved, provision *must* be made for permitting some city, town, ship or county to issue a few more bonds, Gee Whillikin *must* be made a pharmacist and Miss Borer's name *must* be changed, of course the men who are carrying the unequal burdens of taxation can wait. *And they do wait.*

Equally severe is the complaint that comes because so much property escapes taxation entirely. A careful examination of our assessment laws reveals the fact that whatever just ground there is for complaint comes more from the failure to enforce the laws already enacted, than from a want of law. The law requires the assessor to administer a strong oath to every person assessed. Yet it is the common knowledge of men that this is not done one time in ten. Ample provisions are made for tracing down the hidden property and compelling it to come forth from its hiding place. Courts of inquiry can be held, witnesses subpoenaed and compelled to testify, yet these remedies are passed over. It has become a true maxim in Kansas "That laws, however good, won't enforce themselves." As long as the people would rather pay extra taxes than incur the displeasure of their neighbors, by insisting on an enforcement of the law, these irregularities will exist.

The demands for new and amended laws along these lines, while so many ample provisions are untried and unused, are as unreasonable as the demand of a general would be for a large reinforcement, when he had ample reserves that he had never called into action.

The code of civil and criminal procedure in Kansas is perhaps the nearest perfect of all our laws, and the reason is that they are used and *enforced*, and when amendments are made to these laws they are based on actual *experience* and not on *theory*.

Few laws should be repealed or amended until an honest effort has been made to enforce them. Unless this is done the new laws will be as experimental as were the old ones.

G. H. LAMB, Chairman.

On motion of Mr. Slonecker these two reports were received and filed.

At this point the chairman named the committee provided for at the morning session on Supreme Court Amendment, as follows: S. H. Allen, Sam Kimble, T. F. Garver, David Martin, L. H. Perkins, Winfield Freeman, David Ritchie, J. D. Milliken, J. F. Herrick.

Mr. Hugh P. Farrelly delivered an address on "The Legal Aspect of Trusts and Their Control," which was followed by Mr. W. H. Rossington in an address on the same subject.

Mr. Overmyer made a few remarks concerning the matter under discussion and moved the publication of the two addresses, which motion prevailed.

Mr. F. L. Martin moved that a special committee be appointed by the Association to confer with committees appointed by other State Bar Associations in reference to the proposed celebration of John Marshal Day, February 4, 1901, which motion carried without objection. Said committee being named as follows: F. L. Martin, chairman; Wm. Thomson, N. H. Loomis.

The committee on nomination of officers for the ensuing year here made its report as follows:

President, Sam Kimble, Manhattan; Vice-president, Silas Porter, Kansas City; Secretary, D. A. Valentine, Clay Center; Treasurer, Howel Jones, Topeka.

Executive council: B. F. Milton, chairman, Dodge City; J. G. Slonecker, Topeka; Sidney Hayden, Holton; W. E. Saum, Hays City; John T. Burris, Olathe.

Delegates to American Bar Association: Frank Doster, Marion; A. H. Horton, Topeka; W. Littlefield, Topeka.

Alternates: W. R. Smith, Kansas City; L. Stillwell, Erie; M. P. Simpson, McPherson.

On motion of David Martin the report was adopted and the gentlemen named respectively declared elected officers for the ensuing year.

Report of Treasurer Howel Jones was read by himself and unanimously approved by the Association. The following appointments were announced by Sam Kimble, president elect, for the ensuing year:

Judiciary committee: David Overmeyer, chairman, Topeka; J. F. Her-  
rick, Wellington; H. P. Farrelly, Chanute; G. H. Lamb, Yates Center; B. P.  
Waggener, Atchison.

Committee on Amendments to Laws: F. L. Williams, chairman, Clay Center; John D. Milliken, McPherson; J. W. Parker, Olathe; H. F. Mason, Garden City; S. J. Osborn, Salina.

Memorial committee: John C. Postlethwaite, chairman, Jewell City; J. T. Pringle, Burlingame; Eugene F. Ware, Topeka.

Committee on Legal Education and State University Law School: Eugene Hagan, chairman, Topeka; W. S. Roark, Junction City; Ed. C. Little, Abilene; Frank Wells, Seneca; J. W. Green, Lawrence.

The addresses delivered before the Association at this meeting appear in the following pages.

Adjourned.

C. J. BROWN, Secretary.

## ADDRESSES.

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### THE EVOLUTION OF A WORLD-POWER.

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PRESIDENT C. C. COLEMAN.

After careful reflection, it has been thought best to make the theme of this address somewhat different in nature from those which the Bar Association has been accustomed to expect on similar occasions. Most of the great subjects of the Law seem to have been already ably and sufficiently expounded; no impending emergency seems to demand a "key-note" from this desk; no flagrant abuse in our system appears to cry aloud for a champion, all belted and armed with argument and precedent, to prove it unconstitutional; "The Jury System" is demanding no further exposition, and the gentlemen of the bar are ceasing to find fault with this Bulwark of our Liberties; "The Lawyer and the Citizen" appear to be dwelling together in peace and harmony, and even the "Lawyer in Politics" has not called upon your president to elucidate his position—in truth he doesn't want it elucidated; the "Lawyer in Literature" has not invaded our realm, to an extent warranting quarantine agitation; "Our Judiciary" seems sound and well cared for, and the bar at large fairly prosperous and content. Bearing in mind this felicitous situation, it has seemed not improper to dwell for awhile, at the opening of our session, upon a subject of paramount interest to every patriotic citizen, and, with redoubled intensity, interesting to every lawyer who loves his country and his race.

With the beginning of time, Intellect began to wrestle with the problems of nature. With no experience, no history, no traditions, no ancestry, no literature, no teacher, the human mind could but reason from conditions, real and apparent, back to probable or fanciful causes. Fertile imagination, faulty logic and untaught teachers united to force upon credulity many preposterous stories of tribal and national history, and ridiculous traditions of ancestral prowess and patriarchal wisdom, which were sufficient for the curi-

osity and family pride of those primeval ages—now only fit for the wonder-book that may amuse and please the wiser infants of modern days. Where ignorant reason failed, or where the fogs of antiquity obscured the vision of untrained intellect, superstition took up the story; and the religions of Egypt, Persia, Greece, Rome—of all the savage tribes of every land (some would add, of Judea also)—accounted, by supernatural causes, for all else. Between these two forces—Philosophy and Superstition—a mighty conflict was waged through successive ages, in all lands. Sometimes they seemed almost to blend into one vast system of error and fallacy, when Philosophy was merged into Superstition. Again they drifted apart, only to re-engage in the never ending combat.

The question of the origin of man furnished to these contending factions of the ages, a fathomless ocean for research and speculation; and into its obscure depths, both combatants plunged and floundered. The student of the intellect sounded the full scale of philosophical learning and mental processes; but the matchless harmony of its melody left his question still unanswered. The geologist spent his life in reading, with exquisite skill, the handwriting of God in nature's libraries; but at the end of the entrancing story, still asked, "Whence am I?" He, who scanned the sublime mysteries of the stars, to whom "The heavens declare the glory of God, and the firmament sheweth His handiwork"—although his vision had pierced the infinite universe, had marked for the sun his course and shown to the moon her orbit, and had found out the lurking places of the uttermost planet; and although he had set down in his chart the doom of worlds, suns and systems—yet asked and answered not—"Whence have I come?" "Whither do I go?" The priests of every pagan system of religion and deity had each his theory; all based on preposterous mythology or fanciful tales of primeval Divinity. The expounders of orthodoxy read from the books of Moses a beautiful allegory. They placed upon the magnificent symbolism of Genesis a literal rendering, and told to the Nations a story, perhaps the most absurd of all—and on many a block, stake and scaffold and in the sanded arena, sealed their faith with their blood.

It remained for the latter half of the nineteenth century to give to the world a Charles Darwin; first to laugh him to scorn, and then, through him, to reveal to the minds of men, first as a theory, then as a demonstration, the sublime truth of Evolution—by the processes of which, one age, one cycle, one aeon upon the shoulders of another, builds up, from the protoplasm of original antiquity, to the Adam of Genesis. Then it was all plain, even to the strictest Theologist, who read his Moses again in the light of modern revelation. Already the feeble resistance of prejudice and bigotry is broken down, and the great truth of Evolution in physical life, is established on a rock-firm base.



Progress in every realm of ethical, intellectual, moral and national life must be by analogous stages. In truth, Evolution is progress. Philosophy tells us that in all the universe, there is no such thing as rest. Nowhere, between the inconceivable antipodes of infinity, is there such a phenomenon as a body at rest. All is motion, all activity. These entities which seem most at rest, are in reality the most active of all. The eternal stars, which seem so frozen and steadfast in space as to be misnamed "fixed", are verily in motion at a rate fairly outspeeding a thought of the mind; as compared with which, the velocity of our own planet around its central sun is but the tortoise's pace to the speeding hare. It is so in human life. The person who avoids activity, action, service, grows stolid and rheumatic; the brain that is latent grows dull and slothful; the arm that is unused grows paralytic and weak. No less so among the minor organizations of men; inaction is fatal; the sure precursor of failure. The political party that rests content with the reforms and benefits it has already achieved, must give way to another that has new work to do. The church which only lives to glorify its past, must yield to one which will move onward to save and benefit yet other races and ages; the lodge which has no "work" will surrender its charter; the lawyer who takes no new cases will soon be only a "prominent citizen"; the nation that moves not up to higher, must sink to lower planes. So it is seen that the same fundamental principle of Evolution—progress—governs the greatest and the smallest interests of humanity. There is no highest—there is always a higher.

Under the influence of these laws, and ruled by these forces, every World-Power, that has dominated the destinies of the earth, has had its being; each for its lowest stage, taking the highest of that which has preceded it; and when it ceased to evolve, has fallen into chaos and ruin. Sometimes the pace was slow and sluggish as the march of the centuries; sometimes, by bounds that outleaped the flight of the years.

The government of the United States, in which all good citizens of it have so much of just pride, for a quarter-century more than a round hundred years, has been the marvel of the nations. Other World-Powers have grown and flourished, but their evolution was the slow accretion of ages and cycles. It took a thousand years for Egypt and Persia to attain their majority. Immemorial ages culminated in Alexander and the Macedonian phalanx. Rome struggled through a national infancy of seven hundred years. English history, coeval with the Common Law, reaches back into the mystery and fable of antiquity. Every European power and race found its origin in the early centuries of the Christian Era. By the processes of Evolution, like the slow imperceptible and resistless grind of the glaciers, they have crawled from obscurity into the front rank of World-Powers, and into the midday blaze of modern enlightenment. Not so with our own people, nation and race (for we are an American race). With leaps and vaults the colonies of the Atlantic

seaboard sprung into national importance. At a heat which paralyzed the conservatism of Europe, those fragments of national metal were welded into an iron force which broke the bonds of tyranny; and from those very manacles were forged in solid steel the frame-work of a New National fabric, Founded on the Adamant of Liberty; reared by the hands of patriotism; girded, braced and bastioned with the enduring and expansive forces of the Common Law; sustained by the stalwart hearts and active brains of our united and prosperous people, what external or internal enemy can do our country hurt? What lapse of ages can ever break her strength, while her teeming millions join heart and hand, voice and brain to defend, support and maintain the bright banner that waves "o'er the land of the free and the home of the brave?"

While we glory in the triumphs of our splendid history, and celebrate in story and song the deeds of our heroes and the achievements of our mighty ones, we should draw from that history and from the words and wisdom of those founders of the Republic, the lessons by which we shall be able to preserve what they have builded, and complete what they have so grandly begun, just as they improved and strengthened the work their fathers did.

As the great scheme of the Destinies of mankind has unfolded itself, each age has presented its problems, each period developed its duties; and never has the problem lacked a solution, nor the duty failed of performance. Every Golden Fleece has had its Jason; every Gordian knot its Alexander; every Thermopylae its Leonidas; every emergency has developed its own Master. The period of revolution lacked not its Washington and its Hamilton; the period of compromise had its Clay and its Webster; the dark crisis of civil strife gave to the world and to history its Lincoln and its Grant; the Era of Reconstruction had its giant for every duty; the emergencies of the present period have lacked not the unerring wisdom and foresight of its McKinley, the irresistible force and unequalled tact of the greatest admiral of history, nor the bravery and determination of military and naval chieftains, with whose careers their countrymen fearlessly challenge comparison.

The war with Spain, forced by friends and opponents upon an administration unready for it, was prosecuted for a noble purpose, with motives the highest that ever impelled national action—to free the oppressed and to chastise tyranny. Both those objects were accomplished far more quickly, and at less cost in life and treasure, than the most sanguine hoped. These were the expected and the intended results. But it bore other and greater fruits, as its natural, necessary, though unforeseen results. The blood that flowed at Santiago and El Caney, at Havana and Manila, poured from heroic hearts from North and South, washed out all the stains of sectional strife, made the sons of the Green mountains and of the sunny South brothers again as they should be. Thus when in the ripeness of time, the reconciliation of brothers once in arms the one against the other had become a possibility

that patriots began to hope their children might see, common cause against tyranny and oppression at our doors, accomplished in a few short months what years and decades could not have done by the agencies of peace. If there were no other result, this were enough to send up from all our hills and plains the grateful thanksgiving of a reunited people. But more than that. The close of that contest found us with the richest islands of all the seas in our possession, whether we would or not. Porto Rico—at the gateway of the Great Gulf; the Philippines—stretching as a line of sentinels along and across the highways of the vast Pacific. Nay, still more—the destinies of a race of men were in our hands. They were the untaught, unskilled children of nature. To quote from the magnificent speech of Senator Beveridge, recently delivered, "We are dealing with Orientals who are Malays. \* \* \* Malays instructed in Spanish methods. They mistake kindness for weakness; forbearance for fear. It could not be otherwise, unless you could erase hundreds of years of savagery, other hundreds of years of Orientalism, and still other hundreds of years of Spanish character and custom." They were warlike, treacherous, superstitious, revengeful, recognizing no authority but force. They were controlled and guided by ambitious leaders, dictators and chiefs, whose selfish and savage natures would respect neither personal nor property rights. The on-roll of resistless evolution had confronted us with new and unforeseen problems, which, all unheralded, stood forth and demanded solution.

Besides these responsibilities there were others in close contact with them no less urgent. "Westward the Star of Empire takes its way"; and in its imperial orbit, it now shed its rays upon the eastern shores of the boundless Pacific. There were no more lands for its commerce to conquer. The untold multiplications of our resources and products claimed at governmental hands our share of the world's demands and needs. The people of America have and claim the right to demand that they must be reckoned with in the control of the world's markets and development. All the statesmen and diplomatists of the earth recognize the vastness of the now but incipient development and civilization of eastern Asia; and that the commercial battles of the future are to be for the control of its illimitable demands. England for years had had her base at Hong Kong; Germany, none too soon, had acquired her oriental footing; Russia for many months had been forging her Siberian railway onward to the very capital of China. America, alone of all the powers, had stood aloof and alone, confident in her magnificent isolation; and had permitted herself to be left out of consideration in the new era of Commercial and National Expansion. While her teeming millions were looking beyond the seas for new fields, the means of reaching and holding them had been overlooked and allowed to slip away. Standing in the position we held before the Spanish war, we could no more hope to compete with those pioneers in the Oriental commerce than a revolutionary musket could

measure trajectory with a Krag-Jorgenson rifle. We were, in effect, shut out from the vast possibilities of the Pacific ocean, which is and ought to be *our* ocean, just as the Atlantic is that of Europe. At this articulation of our Evolution, and without our own volition, the key to our Commercial and National problems was thrust into our hands. "The Philippine Islands, the last land left of all the Oceans" were ours. They stood at the gateways of all Pacific commerce. If ever America was to be a sharer in the rich markets of Asia she must own, control and hold the Philippine Islands forever. Now that they are thus thrust into her hands, short-sighted, aye blind is he, who would say to her, "Cast away the golden key." Possession and enforced responsibility being supplemented by legal title through the ordinary avenues of international treaty, our country could do nothing other than has been done, without forfeiting the respect of mankind, betraying the interests of her own people, being false to her duties to the peaceful majority of the Filipinos, assuming responsibility for a chaos in those islands unparalleled in history, and abandoning a position of advantage which any nation on earth might well have spent years and millions to attain.

Besides these considerations of necessity and advantage, there are other reasons for maintaining our position, no less potent and compelling. The development of the times is fast forcing out the old methods of settling international disputes; and instead of the stern clash of arms and battleships, the more peaceful means of diplomacy and negotiations are to rule the questions of the future between the civilized Nations. But after all, the last argument of diplomacy must be to point to bristling battalions and frowning fleets, ready for action. Without our Oriental base for naval and commercial activities, broad, rich and undivided, our diplomats might play in vain in the great game of the Nations. A hand with no trumps can never win.

This is the business, material and practical side of the proposition; but he is a poor student of his country's history, and has a low opinion of the American people, who thinks there is no other. It has been already remarked that we hold the destinies of a race of men in our hands. Call it the plan of God; call it Destiny; call it military necessity; call it what you will. The solemn fact remains that seven millions of human beings, uncivilized, ignorant, savage—but yet human beings—by the natural and necessary results of the Spanish war, are in our hands, with no government and no capacity to form a government of their own. To this people, and the citizens of other nations resident in the islands, we owe just government; equal opportunities; enjoyment of all rational liberty, religious and civil; instruction in a better way of life than their ancestors have known. We owe them the American school, the American court house, the American jail if they respect not the law. What land or people did America ever rule where any of these rights were denied? Shall they be denied to the millions of Luzon and Mindanao,

because an unprincipled scoundrel, after selling his tribes to Spain, leads them to revolt against America, and calls it patriotism?

Our land is full of unspent enterprise; our capitalists are burdened with unused wealth; our country teems with latent energy. These splendid islands of the tropical seas, where meet the Occident and the Orient, are filled with undeveloped and undiscovered mines; their soil is the virgin bosom of an agricultural empire; their climate a very Italy of the Tropics; their products are such as all the world must have. Half way across the great sea which we are learning to call our own, lie our other islands, only less splendid. At Panama and Nicaragua, the waves of the Atlantic call aloud to the waters of the Pacific, in tones that all the world can hear; and from both seas lift up their hands to the powers that rule this land, beseeching that they may be permitted to rush into each others arms. Upon either side stand the fleets of the world; and from each mast and spar goes forth the demand—Open up this mighty highway. Across the ridge of Nicaragua, Porto Rico waves the star spangled banner to Gallipagos, Gallipagos to Honolulu, Honolulu to Manila. Shall not America open the highway for her enterprise, her capital, her pent up energy, to those fertile Philippine fields, those shining mines, those untold resources, that glorious climate, and show the world once more what the Anglo-Saxon, regenerated in the American, can do with a new world?

Nothing can be more thoroughly unpatriotic and insincere than the claim, not seldom heard, that our government seeks to enslave a people, to subjugate a nation. Nothing is further from the truth, and every citizen of our country who knows our history, and reads the present with unbiased mind, must know it. Nobody is to be enslaved or chained. Are the people of Kansas, or Arizona, or Alaska, or Hawaii, enslaved, because they must render allegiance to the Federal government? It is not true—Luzon will be just as free as Massachusetts; Manila no less so than Topeka. Even Aguinaldo, if he otherwise behaves himself can be just as free as any American citizen. We seek to save them from slavery—slavery to wild hordes of ungoverned savages—to the unbridled ambition of venial and merciless Aguinaldos; from the slavery of some new tyrant who would weld again the riven fetters that Spain forged for so many years. We seek to give them in its stead a government that secures property, punishes only crime, and guarantees liberty to every one deserving it. These simple people, thrust by the hand of Providence, by the evolution of Time, into our hands, have a right to demand of us all this; and the great Republic of Washington and Lincoln, under the stars and stripes, will give them no less.

Confronted by these duties, these problems, these opportunities, what shall our country do? By the immutable law of the Universe, she cannot stand still. In all her history she has never taken a backward step. State by state she has conquered her own continent. When she needed a Louisiana, she had her Jefferson, and bought an Empire; when she had use for a Texas

and a California she spread over them her mighty wings and they were of her brood. When Russia had an Alaska to spare the great Republic was ready and able to take and hold it. Hawaii and Porto Rico, in their turn have taken their proud places under the folds of her flag. Of all our eighty millions who raises his voice to say injustice or wrong has been done to any people in all our realm? All have been benefitted, civilized, elevated. To turn from these new duties would be to change the course of national and racial growth; to renounce the manifest tendency of all our splendid past; to roll back a hundred years the on-march of a western World-Power. It cannot be—it must not be—nay, it will not be; for the rising tide of our national Evolution is already rolling to the West. Who rides not upon it must sink beneath it.

Thus the great problem of the Centuries is evolving its own solution. The world is to be civilized. It is to be controlled by its dominant race, whose pale countenance, firm with conscious power, was set from Asia to the West more than thirty centuries gone; and now back to the Orient is turned again, from our Golden Gate, not to conquer, crush, and despoil, but to enlighten and bless with the same liberty and civilization that have made Columbia great.

## THE DEVELOPMENT OF THE PRIVATE CORPORATION.

O. H. DEAN.

The subject assigned to me suggests much more than can even be referred to within the limits of this occasion.

I will therefore, confine myself to pointing out some of the phases and influences of a private corporation as compared with those which existed in former years.

Although private corporations are said to have existed in the time of Solon, and later are referred to in the Twelve Tables of Rome, they were not in those periods relatively important factors in an economic, social or political sense. It is shown that they possessed under the Roman law practically all the faculties of the corporation known to the common law, but the work they undertook to perform was of restricted character. "The term used by one of the Roman juriconsults to describe the nature of such a corporation or society or body of individuals under the law of the Republic of Rome, is perhaps as appropriate as any general language that can be used to describe a corporation aggregate of the present day, without referring to the special object for which any particular corporation is organized." Chancellor Kent points out that the Romans were very jealous of such combinations of individuals and restrained those that were not specially authorized. In the day of Augustus they had become nurseries of faction and disorder, and that Emperor interposed as Julius Cæsar had done before him, and dissolved all but ancient and legal corporations. "A destructive fire in Nicomedia induced Pliny to recommend to the Emperor Trajan the institution for that city of a fire company of one hundred and fifty men, with an assurance that none but those of that business should be admitted into it, and that the privileges granted them should not be extended to any other purpose, but the Emperor refused the grant, and observed that societies of that sort had greatly disturbed the peace of the cities, and that whatever name he gave them and for

whatever purpose they might be instituted, they would not fail to be mischievous."—2 Kent Com. 269 (side page).

The corporations which were erected in the early history of the common law in England were few in number and restricted in their purposes. They were largely ecclesiastical or educational. A very small number were such as are usually designated as lay corporations.

But it appears from a reliable authority that "The practice of incorporating persons composing particular trades, after the manner of Solon and Numa, prevailed at a very early period in England. A charter is now extant which was conferred by Henry II to the "Weavers' Company", which granted to them their guild, with all the freedom they had in his grandfather's (Hen. I) days. A charter was given to "The Goldsmiths" in 1327; and another to "The Mercers" in 1393. "The Haberdashers" were incorporated in 1407; "The Fishmongers" in 1433; "The Vintners" in 1487; and "The Merchant Tailors" in 1466.

Among the secular corporations of the Roman law were included companies composed of merchants, etc., which embarked in commercial adventures. The spirit of commercial enterprise, which gave rise to the establishment or perhaps more properly, to the resuscitation of independent towns and cities in modern Europe, led also the way to commercial corporations of a less political character, and which principally consisted of mercantile and other adventurers. To such companies, which had in view their own private emolument, great privileges and monopolies were given, in order to induce them to hazard a considerable portion of their fortunes in the accomplishment of designs of private emolument, which would, it was supposed, at the same time, be beneficial to the government and the nation; and which, without charters of incorporation, would not have been prosecuted. As early as the year 1248, a company of Burgundians received an act of incorporation, in order to induce them to employ their capital for the promotion of objects, the tendency of which was to the public benefit. This company was afterwards translated to England, and there confirmed by Edward I, and received, in the reign of Henry VI the name of the "Merchant Adventurers." The revolutions which happened in the Low Countries towards the end of the sixteenth century, and which laid the foundation of the Republic of Holland, having prevented the company from continuing commerce with their ancient freedom, they were compelled to turn it almost wholly to the side of Hamburg and the cities on the German ocean; from which the name was changed to that of Hamburg Company, though the ancient title of Merchant Adventurers is retained in all their writings. The Russian Company was first projected towards the end of the reign of Edward VI., and executed in the first and second years of Phillip and Mary; but had not its perfection till its charter was confirmed by act of parliament, under Queen Elizabeth, in 1566. The charter of the Eastland Company, incorporated by Queen Elizabeth, is



dated in the year 1579. The Turkey or Levant Company, had its rise under the same queen, in 1581; and so did the celebrated East India Company, in 1600. The charter of the Hudson's Bay Company, is dated in the year 1670; and the South Sea Company grew out of the long war between England and France in the reign of Queen Anne."—Angell & Ames on Corporations, Sections 52 and 53.

I need not remind you that out of the East India Company grew the Empire of India, of three hundred millions of people, now dominated by the Anglo-Saxon civilization and in a large measure by the common law, and you are all familiar with the important work the Hudson Bay Company did toward the settlement and development of the Dominion of Canada. It still has many offices and transacts much business in the Dominion. We are informed that the Bank of England was modeled after the Bank of St. George of Genoa founded in 1407.

The early cities, towns and burroughs established in England and on the Continent, which acquired either by purchase or by voluntary grant from the feudal barons certain local rights, privileges, and immunities, did much toward breaking down and destroying the tyranny of the feudal system. They became, as Chancellor Kent terms them, "little republics" in which self-government was practiced and individual rights and enterprises were fostered. In like manner the capacity to unite the capital, skill and labor of many persons in a common purpose did much, not only for the advancement of learning, but for the development of trade and commerce.

It has been remarked that "An absence of great wealth was common to the inhabitants of the United States at the commencement of the national independence, and such a condition of society came soon to be deemed preservative of our republican institutions; and it was this consideration which induced the abolishment of entailments, the suppression of the right of primogeniture, and protracted fiduciary accumulations. By the operation of such legislation, a state would have accomplished but little in the way of banking and insurance, and in turnpike and railroads had not the absence of great capitalists been remedied by corporate associations, which aggregate the resources of many persons, and thereby yield the advantage of great capitals without the supposed disadvantages of great private fortunes."—Angell & Ames on Corporations, Section 63.

Private corporations for business purposes in the early history of this country were scarcely known, and were of little legal significance.

In *McKim vs. Odon*, (1829) 3 Bland's Ch. 407, 418, Chancellor Bland stated that he believed there was no such corporation created in the colonial times in this country. Judge Baldwin, of Connecticut, however, shows that the "New London Society for Trade and Commerce United" was incorporated by the colony of Connecticut in 1731, and that this corporation had capital

stock and issued circulating bills as currency.—*Harvard Law Review*, (1888) 165.

It can also be shown that there were a few others existing during that period, but they were of little consequence in law or trade. After the Revolution they began to multiply so rapidly that the people of New York by its Constitution which they amended in 1821, endeavored to check as the Chancellor expressed it, "the improvident increase" of corporations by requiring the consent of two-thirds of the members elected to each branch of the legislature to every bill for creating, continuing, altering or renewing any body politic or corporate.

In Pennsylvania in 1830, literary, charitable, religious and fire companies were created under the sanction of the Supreme Court, while towns and villages were incorporated by the courts' quarter sessions, with the concurrence of the grand jury of the county.

In Wisconsin no banking institution was allowed to be incorporated under the constitution of 1846. Massachusetts furnished greater facilities for the creation of corporations, but a law was passed in 1880 that the charters of all corporations should at all times be subject to amendment, alteration or repeal at the pleasure of the legislature unless there should be in the act creating the corporation an express provision to the contrary.

The policy of the law with reference to the creation of corporations is changed. Today every facility is furnished for their creation. Formerly they were created almost wholly by special legislative enactments, and a good deal of dignity and importance attached to such grants. They were regarded as franchises in fact as well as in law. The number increased so rapidly by this method that the session laws of the different states contained vast numbers of these special enactments, and later on so hastily and inconsiderately were these grants bestowed that corporations were established with vast powers and privileges; but these powers and privileges were often conveyed by reference to some similar charter enacted at some previous sitting of the legislature. These special grants contained many exclusive rights and privileges which resulted in much wrong to the general public, and led to many protests against the correctness of the conclusion reached in the Dartmouth College case.

Corporations are now created as a rule under general laws, and there are practically no restraints upon their formation to carry on any legitimate business or industry in which a natural person may engage. The result is that the greater part of the business of this country is done by the corporations. In addition to the vast carrying business of passengers and freight performed by them on land and on our rivers and lakes they transact all or practically all of the insurance business, life, accident, fire, guaranty and fidelity. We have also vast corporations organized to own and operate packing houses, stock yards, street railways, omnibus lines, telegraph, telephone

and electric light properties. We have also incorporated mercantile companies of various kinds, hotel companies, building companies, building and loan associations. The corporations also own the churches, the colleges and schools not maintained by the state; hospitals, charitable institutions, printing, publishing, newspaper associations; and the social and literary clubs. are all largely organized as corporations. In short, every field of human endeavor is to a great extent occupied by the modern corporation. The legislature of Missouri and some of the other states, after enumerating every conceivable purpose for which a corporation may be established, has in the fear that something might be overlooked or forgotten. provided with respect to business and manufacturing associations, that they may be created for any other purpose "intended for pecuniary gain or profit not otherwise specially provided for nor inconsistent with the Constitution and laws of this state." The result is that a large proportion of the wealth of this country is now invested in corporate enterprises, and the savings banks, trust companies, life, fire and other insurance companies, as well as the fortunes of private individuals, are invested in the stocks and bonds of private corporate enterprises. I noticed recently that one of the principal life insurance companies of this country in December 1898 held as an indemnity to its policy-holders \$127,630,450 of the stock and bonds of other corporations, most of which were those of private companies.

The growth of the corporation, in view of former conditions, is something anomalous and startling. Its economic effects are largely seen in the development of enormous business and manufacturing enterprises in which there is such a vast aggregation of capital, and such a tremendous search for labor-saving appliances and economic results, that we as a nation are rapidly becoming greater than any other nation, past or present, in all that pertains to the mechanic and industrial arts.

The corporation is the great factor of our industrial development. The faculty of continuity or perpetual succession, as we term it, which inheres in every corporation, notwithstanding changes in its memberships and the restricted liability of its shareholders, makes their creation possible.

The laws of many of the states which permit corporations to be created for every kind of business with a nominal capital of a vast amount, and without any actual capital paid in, have resulted in the spawning of a large number of illegitimate associations which not only defraud the public, but are a bane to society and prejudicial to legitimate corporate undertakings.

The process which has been recently going on of creating vast corporations, which seek to acquire the business and property of similar corporations, and thereby to control the output and fix prices of various staple products throughout the country, cannot fail to have a pronounced and in some directions baneful effect. In most instances the attempt is made to

make large earnings on stock that has never been paid for, at the expense of the general public.

We can understand why the courts have regarded with indulgence the rights of the holders of stocks and bonds of railroads and certain other enterprises after they have gone out into the commercial world for sale, although in the first instance the actual capital invested in such enterprises was out of proportion to the par value of such stock and bonds, for the reason that not only the costs of such enterprises were very great in the first instance, and difficult of inauguration, without special inducements, but the risks and danger of losing the capital invested were very great. Just as we may say now that the decisions permitting municipalities to subsidise railroads as quasi public corporations, and the further principle that the officers of such municipalities should be treated as agents clothed with general powers, were both wrong in the strict logic of the law, but who will say that courts of justice in consideration of all the facts in the case could have done otherwise?

The legislation which permits the indiscriminate voting of bonds for railroads without any safeguards for the protection of the investments of the proceeds of such bonds, was responsible for many of the evils that followed. In like manner, the legislation which permits the establishment of corporations without the full actual capital paid in, or limitations upon the amount of its capitalization, or without making provision practically for any visitorial powers upon the part of the state as to its conduct and operations, and which permits them to escape the payment of their proportion of the burdens of taxation, is largely responsible for many of the existing evils. It is the present condition of the law which permits the formation of the so-called trusts which seek to control the leading industries of our country.

Concerning these combinations I will say, although it is always dangerous to prophecy, that in my judgment many of them, in fact the greater part of them, will ultimately fall to pieces from their own weight. Their excessive capitalization and the excessive charges for their products will invite such competition as will destroy them. They cannot maintain supremacy unless they control the raw materials out of which their various products are made or manufactured, (and these they cannot control), and sell their products at such a reduced cost as to prevent competition, and this they cannot do when so much of their capital stock represents no actual investment. Ultimately they must yield to the great and ever-pressing law of trade rivalry. In the meantime, however, they will do much injury.

In view of the time I have already consumed I can discuss in only a few of its phases the legal status of the modern private corporation.

Formerly a private corporation could not commit disseisin. This was held by an eminent judge in this country at an early date. *Weston vs. Hunt*, 2 Mass. 502. It was also said in England that a corporation could not be

guilty of tort except by its writings, under seal. --Angell & Ames on Corporations, 2 Ed. Sec. 186.

In *Tipling vs. Pexell*, 2 Bulst. 33, this language was used in 1618: "The opinion of Manwood, Ch. Baron, was this as touching corporations, that they are invisible, immortal and that they have no souls. A corporation is a body aggregate. None can create souls but God, but the king creates them, and therefore they have no souls."

It was therefore argued that a corporation could not be guilty of a malicious act, because it was an invisible, intangible and soulless being and from the nature of things could not be guilty of a wrong. Morawitz on corporations, Sec. 725. But now the prevailing doctrine is as stated by the Supreme Court of the United States:

"Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. They are liable for the acts of their servants, while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel. In certain cases it may be indicted for misfeasance or nonfeasance touching duties imposed upon it in which the public are interested. Its offenses may be such as will forfeit its existence." --*National Bank vs. Graham*, 100 U. S. 699, 702.

It may be liable for knowingly keeping a mischievous animal; *Stiles vs. Cardiff etc. Nav. Co.*, 33 L. J. Q. B. 310; or for bringing a vexatious civil suit; *Goodspeed vs. East Haddam Bank*, 22 Conn. 530.

The decisions with reference to the power reserved in many of the states since the decision in the *Dartmouth College* case to amend as well as repeal the charters of private corporations, are not in harmony as to the extent the legislature may go in making amendments. It is certain that this power to amend is not unlimited.

In *Shields vs. Ohio*, 95 U. S. 324, it was said: "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment and alteration."

In *Sinking Fund Cases*, 99 U. S. 700, 720, Justice Miller said: "That this power has a limit no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession, of contracts lawfully made, but as was said by this court through Mr. Justice Clifford in

Miller vs. State, 15 Wall. 198, it may safely be affirmed that the reserved power may be exercised to almost any extent to carry into effect the original purposes of the grant, or to secure the due administration of its affairs so as to protect the rights of the stockholders and creditors and for the proper disposition of its assets." And in Holyoke vs. Lyman, 15 Wall. 519, "to protect the rights of the public and of the creditors, or to promote the due administration of the affairs of the corporation."

Likewise in Michigan it was said: "The reserved right to amend or repeal a charter leaves the state where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired."—Smith vs. Lake Shore, etc., Co. 72 N. W. Rep. 328. (Mich. 1897.)

"It is argued with much force that this reserved power should be restricted to the making of those amendments only in which the state has a public interest. Any attempt to use this power of amendment for the purpose of authorizing a majority of the stockholders to force upon the minority a material change in the enterprise is contrary to law and the spirit of justice. Under such reserved power the legislature has only that right to amend the charter which it would have had in case the Dartmouth College case had decided that the federal constitution did not apply to corporate charters. \* \* By this reserved right the restraint of the federal constitution is done away with. But the power to make a new contract for the stockholders is not thereby given to the legislature. The legislature may repeal the charter, but cannot force any stockholder into a contract against his will."—1 Cook on Corporations.

There is at present a disposition upon the part of the courts to sometimes completely ignore the corporate entity when it is necessary to prevent fraud being done. It has been held that when a person has contracted not to do a certain thing, he cannot form and control a corporation and have the corporation do that act.—Beale vs. Chase, 31 Mich. 490.

And where a patentee is under obligation to assign his patent, a corporation wholly owned by him is not protected as a bona fide purchaser of the patent from him.—National etc. Co. vs. Conn. etc. Co., 73 Fed. Rep. 491.

Where it would be illegal for two or more corporations to unite in regulating the production and price of an article, it is illegal to accomplish that result by placing all the shares of stock of those corporations in the hands of trustees and thereby securing co-operating boards of directors.

It was recently held in England where an individual transferred his business to a corporation formed for that purpose and continued to carry on the business in the name of the corporation, he being practically the only stockholder, that he was liable for the corporate debts on the theory of principal and agent, but the House of Lords reversed this and held that he was not liable.—2 Cook on Stockholders, Sec. 663.

The New York Court of Appeals said recently in *Anthony vs. American Glucose Co.* 146 N. Y. 407, "We have of late refused to be always and utterly trammelled by the logic derived from corporate existence where it only serves to distort or hide the truth."

The principle of cumulative voting by a minority to secure representation in the board management of a corporation has found recognition in several states, and is an important feature of the modern corporation.

The trust fund theory which took possession of the minds of some of the judges of our state courts and some of the district judges of the federal courts, has been practically wiped out. Although the decision of Mr. Justice Storey in *Wood vs. Dummer*, 3 Mason 311, in which he held that the capital stock of the corporation was a trust fund for the creditors, was made many years ago, it was never claimed until recently that this meant anything more than that the assets of the corporation represented by the capital stock could not be given away or distributed among the shareholders until after the corporate debts were paid, and that they stood as a protection for the payment of its debts, just as the entire property of a natural person stands as an indemnity for his obligations, not to be given away or kept back by him. But the argument was built up a few years ago that because the capital stock was said to be a trust fund, that it followed necessarily that an insolvent corporation, although fully possessed of the *jus disponendi* as to its property, could not exercise any right of preference as to its creditors, especially in favor of its officers, directors or stockholders, who may have made loans to it at times and under conditions when it became impossible for it to obtain credit from anybody else. Fortunately this doctrine has not continued to find judicial recognition in many of the highest courts.

The tendency of the courts in view of the radical and often unjust legislation intended to affect corporations only, and often but one class of corporations, to declare such legislation partial and as not affording to the corporation affected equal protection of the laws, is clearly in the interest of good government. When laws are given equal application to all persons and all kinds of property as far as possible, greater care and conservatism will be exercised in their enactment.

The case of *State vs. Loomas*, 115 Mo. 307, illustrates this principle. In that case persons and corporations engaged in the business of manufacturing or mining were prohibited by statute from issuing to their employes for

labor performed, orders payable in merchandise only. The statute was declared invalid because applicable only to the two classes of business mentioned.

The case of *Gulf, Colorado & Santa Fe Railroad Co. vs. Ellis*, 168 U. S. 150, cites with approval the opinion of Judge Black in *State vs. Loomas*. It holds that a statute is invalid which attempts to allow attorney's fees in addition to costs on all claims against railroad companies under fifty dollars, if not paid according to the demand prescribed by the statute.

The language of Justice Matthews, in *Yick Wo vs. Hopper*, 118 U. S. 356, 359, deserves the commendation it has received: "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to believe they do not leave room for the plain action of purely arbitrary power."

The doctrine of *ultra vires* is being declared according to the principles of equity and justice. When contracts are in violation of the corporate powers, but are executed by the party demanding performance, the corporation will not be permitted to deny its liability by pleading its legal incapacity, at least to the extent of the benefits received. The authorities appear to be divided in a certain class of cases, as to whether the action can be maintained on the contract, or should be brought as on a *quantum meruit*.

*Bath Gaslight Co. vs. Clofton*, 151 N. Y. 24.

*Pittsburg etc. R. Co. vs. Keokuk etc. Bridge Co.* 151 U. S. 371.

*Penn. R. Co. vs. St. Louis, etc., R. Co.*, 118 U. S. 290.

The constitutional provision in several of the states which prohibits the issuing of stock or bonds except for money paid, labor done or property actually received, and which declares that all fictitious increase of stock or indebtedness should be void, is creating much discussion in the courts and among text-writers. It has been recently declared in a very useful textbook (1 *Cook on Corporations*, Sec. 47) that the result of the majority of the decisions is that this provision has failed in its purpose, and watered stock and bonds without actual value paid are issued as freely as if this provision had never been adopted.

Massachusetts has enacted a statute which provides that before a corporation will be permitted to issue its stocks or bonds, commissioners appointed by the state will first examine and see whether they represent money or moneys' worth, and it cannot but have a beneficial effect.

The issue of watered stocks and bonds does much injury. People are induced to buy them as representatives of value, when they frequently represent little or nothing, and they give to the corporation a credit in excess of what it is entitled to, and the public are thereby deceived. The fact that many of the states sanction the creation of corporations with a capital stock of an unlimited amount, without any substantial requirements as to the payment of



the capital either before or after commencing business, not only leads to the injuries complained of, but is a great inducement for the creation of the many trusts or combinations of industries which within a very recent period have become so common. The capitalization is usually far in excess of the actual worth of the property received by the corporation in payment of its stock, and the public are expected by these attempts to secure a monopoly to pay dividends on a capital which has never been invested.

The question is well worthy of consideration in view of the constitutional provisions of our state and of other states already referred to, as to whether or not the issue of fictitiously paid up stock with a view of defrauding the public, does not constitute a misuse of the corporate rights and privileges.—*State vs. Jamesville Water Co.* 92 Wis. 496; 1 Cook on Corp. Sec. 37.

Our Supreme Court in *Van Cleve vs. Berkey*, 148 Mo. 109, has recently rendered an opinion which is liable to be of far reaching consequence. In that case it was held that if property is taken by a corporation in payment of its capital stock at an excessive valuation, the stockholder can be held liable by the corporation creditors, for the difference between what the property was actually worth and the par value of the stock and it is not necessary to first set aside the transaction between the corporation and the vender of the property, and that when a corporation is sent forth in the commercial world accredited by the stockholders as possessed in money or its equivalent in property of the capital equal to the par value of its capital stock, every person dealing with it, unless otherwise advised, has a right to assume that such stock has been fully paid and to extend credit to it in the belief that the money or its equivalent in property will be forthcoming to meet its legitimate demands. Nor will such stockholder be relieved of his duty to respond to the creditors for the difference between the par value of the stock and what he actually paid for it by the fact that he believed or had reason to believe, that the property turned over by him to the company was equal to the par value of the stock received by him.

It is also announced in this case that it is the duty of the stockholder in receiving stock from the corporation to see that it has been paid for in money or its fair equivalent in property or other valuable thing.

This last proposition is contrary to the common law decisions upon this subject. The rule is that if a party purchase a certificate of stock in the open market, in good faith, for value, which recites that it is paid up, he will be protected if it should turn out that the stock has not been paid for.

It has also been held that where there is no recitation in the certificate as to whether the stock has been paid up or not, as to an innocent purchaser for value, the presumption will be that it was paid up, and that all things were regular concerning its issue. It can be said, however, that this last proposition announced by our Supreme Court was not necessarily in the case, and for the present at least can be treated as an *obiter dictum*.

The most important decisions which effect the modern corporations are those which permit the regulation of the income of its property by the state legislatures on the ground that when the owner of the property devotes it to a use in which the public have an interest, he in effect, grants to the public an interest in such use and must to the extent of that interest submit to be controlled by the public for the common good so long as he maintains the use.

Munn vs Illinois, 96 U. S. 113.

Budd vs. N. Y. 143 U. S. 517.

But who will deny that there is not a clear statement of the principle upon which these cases rest and great force as well in the dissenting opinion by Mr. Justice Brewer in Budd vs. N. Y. supra. He uses this language:

"Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity, to wit, the State, has a right to create and maintain, and, therefore, one which all the public have a right to demand and share in. The use is public, because the public may create it, and the individual creating it is doing thereby and *pro tanto* the work of the State. The creation of all highways is a public duty. Railroads are highways. The State may build them. If an individual does that work, he is *pro tanto* doing the work of the State. He devotes his property to a public use. The State doing the work fixes the price for the use. It does not lose the right to fix the price, because an individual voluntarily undertakes to do the work. But this public use is very different from a public interest in the use. There is scarcely any property in whose use the public has no interest. No man liveth unto himself alone, and no man's property is beyond the touch of another's welfare. Everything, the manner and extent of whose use affects the well-being of others, is property in whose use the public has an interest. Take, for instance, the only store in a little village. All the public of that village are interested in it; interested in the quantity and quality of the goods on its shelves, and their prices, in the time at which it opens and closes, and, generally, in the way in which it is managed; in short, interested in the use. Does it follow that that village public has a right to control these matters? That which is true of the single small store in the village, is also true of the largest mercantile establishment in the great city. The magnitude of the business does not change the principle. There may be more individuals interested, a larger public, but still the public. The country merchant who has a small warehouse in which the neighboring farmers are wont to store their potatoes and grain preparatory to shipment occupies the same position as the proprietor of the largest elevator in New York. The public has in each case an interest in the use, and the same interest, no more and no less. \* \* \* Surely the matters in which the public has the most interest, are the supplies

of food and clothing; yet can it be that by reason of this interest the State may fix the price at which the butcher must sell his meat, or the vendor of boots and shoes his goods? \* \* It is suggested that there is a monopoly, and that that justifies legislative interference. There are two kinds of monopoly; one of law, the other of fact. The one exists when exclusive privileges are granted. Such a monopoly, the law which creates alone can break; and being the creation of law justifies legislative control. A monopoly of fact any one can break, and there is no necessity for legislative interference. It exists where any one by his money and labor furnishes facilities for business which no one else has. A man has therefore a monopoly of that business; but it is a monopoly of fact, which any one can break who, with like business courage puts his means into a similar building. Because of the monopoly feature, subject thus easily to be broken, may the legislature regulate the price at which he will lease his offices? So, here, there are no exclusive privileges given to these elevators. They are not upon public ground. If the business is profitable, any one can build another; the field is open for all the elevators, and all the competition that may be desired. If there be a monopoly, it is one of fact and not of law, and one which any individual can break."—*Budd vs. New York*, 148 U. S. 549.

It was once supposed that the legislature of a state could not arbitrarily reduce the income of property, whether it was affected with what is termed a public use or not. The law, however, was declared to the contrary, but it is now said that notwithstanding such legislation, to the courts belong the power and duty of inquiring whether a body of rates prescribed by a legislation or a commission is unjust and unreasonable, and such as to work a practical destruction of the rights of property, and if found so, to restrain it.

*Ragan vs. Farmers Loan & Trust Co.* 154 U. S. 362.

*Snythe vs. Ames*, 169 U. S. 466.

*Chicago etc., Ry. Co. vs. Minn.* 184 U. S. 467.

*Cleveland etc. Co. vs. Cleveland*, 71 Fed. Rep. 610.

But for this important qualification of the doctrine announced in the *Granger* cases much invested capital in many of our greatest enterprises would have been greatly impaired, if not destroyed, by inconsiderate legislation.

The cases announcing this limitation upon the legislative power will always command the respect and approval not only of our profession, but of all right thinking persons.

The scope and value of the 14th amendment to the Federal Constitution is becoming more and more apparent with each passing year.

"The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents, to do, is consistent with the fundamental

law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land." *Smythe vs. Ames*, 169 U. S. 527.

"This as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held." (525 *supra*).

"And in *Chicago, Burlington & Quincy Railroad vs. Chicago*, 166 U. S. 226, 241, it was held that 'a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.'" (525-6 *supra*).

Goldwin Smith says that history "is a series of struggles to elevate the character of humanity in all of its aspects, religious, social, political. Sometimes rising in an agony of aspiration and exertion, frequently followed by relapses and lassitudes as great moral efforts in the case of individuals."

Cannot we also say that the progress of the law in this country represents a constant and mighty, but peaceful, struggle to protect on the one hand the rights of the individual from unjust invasion, and on the other to preserve and deal justly with those great forces and agencies which have made our civilization the greatest, the most prosperous and beneficial, and at the same time the most complex, known to history? Those agencies furnish the industries and facilities which build our cities and our towns. They own and control our seats of learning, our temples of piety and places of beneficence and sweet charity. They add value to every tree in the forest, to the cattle on the plains and on the hills, to all that grows in the field, to the power of our rivers and streams, and to the wealth hidden in the mountains and beneath our plains.

The task may be one of supreme difficulty to determine what is just to the people and what is just to those who invest in our rich corporate enterprises. Its proper performance devolves upon our grand profession—the

bar. That many of the evils complained of might be avoided by a carefully devised system relating to the creation of corporations, is very clear, and that the visitorial powers of the state might be carefully increased without injury to legitimate investments, and all the earnings which properly come to the corporations as well as to the individuals as the reward of superior energy, intelligent industry and enterprise, is also clear.

The maintenance of the successful corporation is important as it is important that the natural person should be allowed the widest scope for the employment of his intelligence and industry. To furnish and preserve opportunity for the individual is and should be one of the highest aims of government, but to destroy his capacity to combine his skill, labor and means with others for the advancement of the industrial and mechanic arts, or learning, charity or piety does not necessarily furnish or preserve opportunity. The infinite number of business and manufacturing industries which have already been inaugurated and which are constantly being inaugurated throughout our great republic and which are reaching out for the trade of other nations, does not destroy, but promotes opportunity.

Out of this agitation, conflict and discussion as to the true relation of the modern corporation to society and the government, will yet come, I well believe, a system of laws which will be so devised as to be just to the general public, and at the same time not weaken or destroy the principal agent of our material growth and prosperity.

**THE CONSTITUTIONAL RIGHT OF CONGRESS TO REFUSE A SEAT  
TO A MEMBER ELECT, PRESENTING A VALID  
CERTIFICATE OF ELECTION.**

H. F. POWNALL.

"Each house shall be the judge of the elections, returns, and qualifications of its own members." What is the meaning of the foregoing part of the United States constitution, and how far may it be warped to fit public sentiment or political purpose, without opening a door to corruption and fraud?

These questions have confronted the thinking people of this country on various occasions, since the day that the state of New Hampshire took the final step which bound together the primitive states of America, and gave to the a new nation.

Perhaps no other like number of words in the constitution have provoked so much earnest discussion with as little result. Handed down to us as they were from Parliament and the States, they were inserted into our present constitution, without even so much as a passing remark on the part of that noted assembly, known as the Constitutional Convention.

Since that time, however, a dispute has arisen as to their proper interpretation. The settlement of this dispute depends, for the most part, upon the answer to one question, namely: "Has Congress a constitutional right to refuse a seat to a member elect, who presents a valid certificate of election?" Who then can answer this question or where can we find the answer? We might prove that they have such right, when acting as a whole, or when they are once organized. This, however, does not effect the disputed point. The word "refuse" signifies that the member in question shall not enjoy even the primitive part of the privilege to which his certificate of election is supposed to entitle him. To accomplish which, necessitates independent action on the part of some one, before the house is in a state of organization.

Who then, if anyone, is competent to assume such authority? We repeat the question, who? The echo comes back from the farthest end of the cen-

tury, and is our only answer. We would ask of the men who gave us our constitution, but they are gone and have left no answer. We must then turn to the countries from which that part of our constitution was borrowed, and what do we find there? The two most noted cases that stand out before us are those of John Wilkes, in England, and Barere of France.

John Wilkes was a criminal of wide repute, and was highly unpopular with the people as a whole. He was elected to the House of Commons and they refused him a seat. He was re-elected, and again they refused him a seat. Four times did this occur, but the people were finally awakened, and after a careful consideration of his case, Wilkes was admitted to a seat, to be dealt with afterwards, and all previous matter in regard to his case was expunged from the record, on the ground that it was subversive of the people's rights, thereby acknowledging to the world the error of their previous action.

Barere was one of the most contemptible characters ever produced by the French nation. So detestable was his character that it was said that he had not one single virtue, not even the semblance of one. To give an idea of his standing in France at that time we will quote from Macaulay, in his essay on Barere. He says, "All France was amazed to learn that the department of the Upper Pyrenees had chosen the proscribed tyrant as a member of The Council of the Five Hundred."

The council which like our House of Commons, was the judge of the election of its own members, refused to admit him. When his name was read from the roll, a cry of indignation rose from the house. "Which of you," exclaimed one member, "would sit by the side of such a monster?" "Not I, not I," answered a crowd of voices. One deputy declared that he would vacate his seat if the hall were polluted by the presence of such a wretch. And yet after much confusion, the Council of the Five Hundred decided, that they had no right to override the will of the people without the most due and careful consideration.

These being the precedents, what else could have been the spirit intended by the framers of our constitution?

The spirit of the constitution, as we glean it from the expressions of its authors and from the constitution itself, is that of careful, studied, and deliberate action in all things. Nowhere in the work of that "Greatest of American Assemblies" do we find an important point, which might affect the rights of the people, decided in any except the most careful manner. Nowhere do we find important matter left to doubtful tribunal, when it might have been given more careful consideration. We must then agree that if any part of such constitution is capable of two or more constructions, that interpretation should be given which will secure to the people the most careful and guarded consideration of their rights.

Measured by the foregoing rule, what would be the answer to our previous question, the subject of our theme? We can see but one application; the house as a whole is the proper tribunal to judge its members, and not the members as individuals to judge each other.

The best judges of the rights of Congress have held to this theory. John Quincy Adams, that noted parliamentarian, the man who after waiting four days for the house to rid itself of the New Jersey dilemma, arose and started the wheels of progress by uttering that memorable sentence, "I propose to put the question myself," that man said "Those members are entitled to vote who hold certificates, according to the constitution and laws of the United States, and the laws of the state of New Jersey." When individual members tried to prevent the members from New Jersey from taking the oath of office, Mr. Adams said, "The state of New Jersey cannot be deprived of a representative on this floor, and it shall not be so long as I sit in this chair."

The Hon. Benj. F. Butler, in the celebrated Cannon case, said, "I desire to say to the house that I do not believe that when a man comes here with proper credentials from the proper authorities it has ever been the custom of the House, or ever ought to be, that he shall not have *prima facie* his seat, because the moment we break away from that rule then in high party times the House could never be organized."

To come down to the late case, known as the "Roberts case" Ex-senator Edmunds voiced the sentiment of the best lawyers of the time when he said, "It is more dangerous to the rights and liberties of the people for the House to set up standards of admission not prescribed by the Constitution than to admit to be sworn any person whom the people of a state choose to elect. That done the Constitution has itself provided for the House ridding itself of any member who upon its own conscience, it believes for any reason ought not to continue there."

We see at a glance that to allow individual members to assume the responsibility of saying who is properly qualified, or to allow them to take even the first steps in that direction, is to take from the House the power which belongs to it and, in the House of Representatives, scatter it broadcast among three hundred and fifty-six individual members, no one of whom has more indicia of membership than has the member whose qualifications are in question.

If such a rule be once firmly established, it will be one step backwards in the struggle for political purity. That it will open the door to a career of corruption, fraud and political trickery, cannot be doubted by a person who has carefully studied the situation. If we once break over the line, where is the point at which we must stop? If one, five, or a dozen members can be refused the privileges to which they are legally entitled, what is the limit at



which this work must cease? If one member possessing a valid certificate of election can be met at the threshold of Congress and refused a seat, cannot one hundred members be treated in like manner?

The Constitution says that a majority shall constitute a quorum to do business and the Supreme Court interprets that to mean a majority of those sworn and entitled to seats. Are the members from the little state of Rhode Island, then if they should be the first to be sworn, at liberty to exclude all other members till such time as they should see fit to admit them, if indeed they should admit them at all? Anyone will readily see the weakness of such a policy. It is foreign in its very nature to the correct idea of a representative government. Common sense would dictate that such a course be avoided.

The Constitution has outlined the qualifications necessary for senators and representatives. Congress has from time to time made laws in regard to the same. The states have moulded their laws to fit those of the nation. Great care has been taken that the people should be properly represented. What individual then, clothed with only like authority as his brother members elect, is so allwise and unqualifiedly superior that he is competent to override all the legal paraphernalia of a state and nation, constitute himself "King of Kings and Lord of Lords" and say to the nation and to the world, "This member is not duly qualified," or "Those members are morally unfit to sit in this house with me"?

We say what "individual," for bear in mind this fact; we are not disputing the right of Congress to decide as to the elections, returns, and qualifications of its members. God forbid that it shall ever be deprived of that right. We are simply disputing the right of members one to judge of the other, before they are in a proper condition to transact business as a House.

Any action taken in regard to one member by another, is almost certain to be imbued with all, or at least a part, of the bias, prejudice and personal friendship or hatred of the member so acting. Imagine then, at a time when opposite political parties are struggling for supremacy and the change of one member would turn the scale, and give the control of the House into the hands of the one party or the other, what a temptation for the first members sworn to prefer against some of their political opponents charges solely for the purpose of gaining control of the House, after which they might keep such members out indefinitely, and thereby deprive whole states of their lawful and just representation, at a time, possibly, when questions were pending which were of vital importance to the state so deprived.

This question was well handled upon a former occasion, when Mr. Banks, a former speaker, in referring to the case of Mr. Rainey said, "I submit that the member elect from South Carolina ought to be admitted to take the oath as a member of this House, because he has the certificate of his government

that he has been elected according to law. There is no reason why the House should not hereafter inquire into the validity of that election. It may make such inquiry the very moment after Mr. Rainey has been admitted upon the certificate. But the very existence of our government depends upon our recognition of the certificates of state governments to the election of members of this House. We could never organize this House if any member was permitted upon any opinion of his own to impeach the certificates of the governments under which members of this House are elected."

If by some oversight of the people or evasion of law, a member is elected to Congress, who is not properly qualified, no matter for what reason, we say by all means remove him; but can we not better trust this work to the representatives of the entire American people than to the hands of one or a few members who may by chance, be the first members sworn and who will, in all probability use the power for the furtherance of political prestige or pecuniary profit? Surely no such power as the latter was ever intended to be conferred by the Constitution.

The Roberts case now before this country throws a delusive light upon this subject. It is one of those cases which are controlled more or less by public sentiment, regardless of the effect it may have on the future. It is one of those cases which cause people to overleap the proper forms of action in their haste to defeat an apparent evil, which in fact could have been easily managed.

The "Roberts case," as all others, could have been reached by the method so often used to settle contested elections and other disputes as to membership, which would, in our humble opinion, have been the only constitutional method of procedure, and would have undoubtedly, been settled in a manner satisfactory to the American people as a whole, yet that impulsiveness of our people has caused their representatives to take a step which partisan politics has unsuccessfully attempted in the past and which it once settled in the affirmative will open the door to a practice more dangerous than has ever yet darkened the halls of Congress.

Dangerous, not on account of action in a case like that of Robert's, for a character like his will never be allowed to long pollute the halls of Congress while the American people retain that love for social purity which has always characterized them and which has been the very foundation of our greatness as a nation. Dangerous we say, not on account of a case like his, but on account of the precedent which may lead to endless chaotic conditions that will thwart the will of the people of any state or states in the Union and ultimately destroy those very principles which the people are so eager to preserve.

Those who defend this hasty method, admit that in cases of contests the member holding the valid certificate should be sworn, seated, and allowed to

vote until his case is properly disposed of by the House. They make a distinction, however, between contested elections and of cases of what they please to term disqualification, admitting that in the one case the member should be sworn and seated and then examined by the House but refusing to the other a like privilege.

It does not appear entirely clear why, in one case where a person presents himself to be sworn depending solely upon the ordinary certificate, which in many cases is disputed by high authority charging him with fraud, crime, and illegal election, that he should be sworn and seated, while the other member holding an undisputed indicia of membership and charged with but one of the above offenses should be turned away, as was at least one member (Representative Whitmore of South Carolina) without even the semblance of a trial.

The power to judge its members was given to Congress for the purpose of keeping it free from any detrimental influence by or possible obligation to the Courts, which would otherwise have been the judge of the election and qualifications of such members. Surely then it was not intended that it should be given into the keeping of one or more individuals whose influence might be far worse than that of the Courts.

The former interpretation of this part of the Constitution, and the interpretation which has always been given by the best friends of that document, is that Congress shall be organized by those persons holding valid certificates of election from their respective states, and that after such organization they shall proceed to remove such members as they shall deem not properly qualified or elected. This seems to be the most rational method and the only one that is well defined, for in addition to all that has been previously stated, it is seriously doubted if Congress has any jurisdiction of a member elect until after such member be sworn. How then do they acquire the right to put a person on trial over whom they have no jurisdiction?

Summing up our previous remarks it is evident that should we adopt this new idea of allowing individual members to overrule the work of states, we would be forsaking a safe, adequate, and time tried rule for a doubtful, dangerous, and unconstitutional prodigy, the child of a demented and revolutionary mind.

The United States Constitution says that "each House" shall be the judge of the elections, returns, and qualifications of its own members and not that the first members sworn shall be such judge.

We say that no such authority as the latter would confer, was ever intended by the framers of the Constitution, and to allow it would be to encourage the members elect to trifle with the will of the people and to strangle the very interest which they are sent there to promote.

## THE STATUS OF PRISONERS IN THE KANSAS PENITENTIARY UNDER DEATH SENTENCE.

A. G. OTIS.

There are at this time in the Kansas State Penitentiary forty-nine prisoners under the sentence of death, and many of them have been there from fifteen to twenty years or more. This aggregation commenced in A. D. 1873, soon after the passage of the law of March 28, A. D. 1872, and which radically changed the course of criminal procedure in capital cases. That law rendered the action of the Executive necessary to give force and effect to the judgment and sentence of the court.

The causes which led up to the passage of this singular law, it is perhaps useless to speak of at this late day, one thing is, however, clearly apparent and that is, that it was intended and designed to defeat the will of the majority of the people upon the question of capital punishment. For if the opponents of capital punishment had had at that time a majority of the Legislature, they certainly would have squarely repealed the law providing for capital punishment, and settled the matter definitely and finally in that way, and would most certainly have not resorted to the subterfuge of obtaining an amendment to the Code of Criminal Procedure apparently harmless, but in effect accomplishing fully their purposes. The law itself is an anomaly. It imposes upon the Executive the clerical duty of certifying the judgment and sentence of the court to the proper officer charged with its execution, but it postpones all action by the Executive for the term of twelve months after the judgment and sentence is certified to him. And this too after all the delays and continuances necessarily had before trial and conviction, and the further delay of appeal ordinarily taken thereon to the Supreme Court. So that a good many years go by after a crime of this character is committed, before it can be punished at all, especially if the defendant has means. Now in all other cases the clerk of the court where trial is had certifies to the proper officer under the seal of the court, the mandate to execute the judgment and sentence of the court.

The power of the Executive for purposes of commutation and pardon, exist wholly independent of this law and would seem to limit and define the

proper and just field of inquiry for the executive officer. Under this law the Governor must examine every case, in fact must try it over, and in effect become Judge, Jury, Court and Executioner; the whole thing. If he should find a record or have knowledge of a conviction; where from the nature, and atrocity of the crime, it clearly appears that the death penalty was the only adequate punishment, and if at the end of twelve months he should resolutely adhere to his purpose and enforce the sentence, then in every subsequent case as an upright Judge, for that is what the law makes him, he must carefully go over all the facts and all the evidence to determine whether the precedent he himself has established shall be followed in this subsequent case, or whether by his non-action, he shall allow the prisoner to suffer a less penalty, and again if he should deem it his duty to enforce the death penalty in any given case, he is met with another grave question, and that is, whether some one or more of these forty-nine men now in custody are not equally guilty. They are all at his mercy, and he is charged with equal duty and equal power in each and every case, both as to convictions had before and those had during his term of office. "A" commits a crime during his administration, which he adjudges proper for the death penalty. "B" commits a crime of equal atrocity prior to his term of office. Shall the one suffer death and the other escape, and if so would not charges of unjust discrimination and of prejudice be properly and justly made against such Executive? Should not both fare alike? Every Executive since 1872 has ignored the law for the law allows itself to be ignored by its express terms. But here is a centralization of power, a transfer of jurisdiction thrown upon the executive office, which does not belong to it. It belongs to the courts and the people. No Governor wants it. If a District Judge is competent to try these cases where high crime is charged, why is he not competent to enforce the judgments of his own court, and if he is not competent, why elect him?

These grave questions of life and death it would seem to me belong to the people and to their own elected judicial officers to determine, and not to the centralized power of another department. Saving to that department the exceptional cases for commutation or pardon where they properly belong.

Turn now to the position of the court under this law. Innocent men are not convicted of crime, especially of this highest of all the crimes enumerated in the statute. It is hard enough to convict the guilty and many escape. The prisoner is protected by a thoughtful and considerate judge, by an impartial jury, by counsel employed for him by the court if he is not able to employ counsel himself, and above all by the inflexible rule of law that requires proof beyond a reasonable doubt before conviction. He also has the right of appeal to correct any errors of the trial court. I have no recollection now of any case in the State where a conviction and final sentence of murder in the first degree was ever shown to be erroneous by after-

discovered testimony. Efforts are always continuously being made to do this, and always as continuously fail. The truth is all these chances and possibilities have been canvassed and weighed at the trial and the prisoner given the benefit of them.

The statute requires that the sentence of the court shall be pronounced upon the prisoner. Now ordinarily it is a serious matter for any court to pronounce a sentence which deprives a man of his life. When it is pronounced in good faith it is an example of the power of the law, of the sovereign will of the people crystallized by the court. It carries its own lesson. No lawyer who ever heard it so pronounced ever forgot the incident, and if promptly carried out it impresses the community with respect for the court, it imposes a salutary restraint upon all classes, and is never forgotten. But under the present law the Judge is required in one breath to sentence the prisoner, and he is bound to say to him that the proof establishes his guilt beyond any reasonable doubt, and that he justly deserves the sentence of death, for if he could not say this he certainly would not sentence him, but in the next breath he is bound to say to the prisoner that the court has no power to carry out the sentence, and that whether it will ever be carried out or not depends altogether upon what the Governor thinks about capital punishment, and also what the Governor thinks about him, the prisoner. The effect of such a sentence is too apparent. The law confesses its own weakness, its own deficiencies, its own want of power. It loses the respect of the community, and its influence for evil goes down among the criminal classes, as penetrating as the air, and as subtle as a pestilence to breed further crime. It does more than this, it invites the criminal class from other states where capital punishment is resolutely inflicted over the border to this free land, where as the Irishman said, "There is no hanging for stealing and whiskey a shilling a quart." This milder administration of justice suits bad men and misguided philanthropists. It does not suit anybody else.

But a more pertinent inquiry, and the real purpose of this article, is to consider the condition of these convicts after sentence. Now the law nowhere contemplates or approves of a condition of suspense. The constitution guarantees a speedy and impartial trial, the law provides that an accused person in confinement, unless tried by the second term of court after arrest, shall be released and go acquit, and after verdict a failure to pronounce sentence at the same term of court would be fatal to the state. In this the court considers the natural anxiety and mental suffering of this state of uncertainty and suspense. Now it seems that in all these cases the Executive had determined to commute the sentence; their failure to act settles this point.

Then why were not these men entitled to know that fact, and to have a legal commutation granted them? Why were not the people entitled to know that the end of the law had been reached, and what that end was?

That these prisoners from their standpoint suffer often in an extreme degree, from this uncertainty and suspense can not be questioned, the organization of the human mind compels this conclusion; it can not be otherwise. If any man doubts this let him try it in his own case in imagination. These men do not know and can not know what day some public sentiment, some change of opinion, some influence prompted by prejudice or passion, policy or revenge, may not claim a victim from their number. The sword is over their head by day and by night. It is suspended by a single thread, and that thread is the caprice of the Executive. No other of the American states presents such a spectacle. Such a number of men held by the law year after year, in the shadow of the scaffold awaiting execution. They are outcasts, perhaps deservedly so, but they are helpless and they are human. By and through this very uncertainty they are suffering a cruel and unusual punishment prohibited alike by the constitution of the state and the common reason of men. One of them during the last year petitioned the Governor to sign the death warrant in his case, averring the suspense intolerable; the Governor as a humane man denied the request.

It would seem that this state of things should not longer exist. Nobody wants to hang these men now. It would do no good, their victims and their crimes have largely long since been forgotten, and it would be a mere act of cruelty and revenge. The courts are through, their power is exhausted. The workings of human character naturally make these men dangerous and desperate prisoners in their present position. They know not their fate or what a day may bring forth, there is nothing before them from their sphere of vision, except death or the possibility of escape through violence and further crime. There is but one remedy, and that remedy would clear up all the past, pave the way for legislation for the future, and bring the actual status and the legal status of these men together, and that is, a general commutation of sentence to imprisonment for life applying to each and every case. They would then know their fate and as human beings adapt themselves to it. This is a matter purely with the Executive, and it may be said that with its solution private citizens have nothing to do. Yet in a matter like this involving the administration of the criminal law, the Executive would naturally be reluctant to act upon his own motion, but might very properly look to a non-partisan Body like the Bar Association, necessarily familiar with all the facts to take the initiative. It may be claimed that the commutation has already been virtually granted by all these Executives and was so intended. This is a mere inference, perhaps faulty in logic and certainly without power in law. Again it may be said that these men have forfeited their lives by their own crimes and are not entitled to any consideration by anybody. The answer is that they have been suffering for years a cruel and unusual punishment, which is prohibited by the ninth section of the Bill of

Rights of the constitution of the state. The law everywhere condemns this element of uncertainty and suspense in punishment as against the rights of the citizens, and further no state can afford to so merge itself in party politics as to ignore its higher duty of making wise, just and humane laws for its citizens. And it may be further claimed that these men know already that they will never be executed. From our standpoint as disinterested spectators this might be true. From their standpoint and their environments they can not possibly know this, for to them the future is a blank and the whole world an enemy.

It is not for me to say how far these views will be approved by other members of the Association, but if they are approved then it would seem to me to come very close to the line of professional duty and professional obligation, that expression of opinion should be made by us collectively thereon. This would tend to bring the whole subject more fully before the Executive, and enable him to act thereon more freely and without embarrassment. It would divest such action, if any was had, of all partisan character and all partisan influence, and would tend to lift the whole subject above the domain and lines of party policy, and place it upon the higher and broader ground of humanity, reason and justice, where it belongs.



## KANSAS PROBATE COURTS.

J. W. PARKER.

Americans are charged with being proud of their country. We admit the charge, and justify our action by the facts in the case. The American who is *not* proud of our institutions is unworthy of the name and we will promptly withdraw our fellowship from him.

As Kansans we have an especial reason to be puffed up. Ample ground for our boast is found in the many arguments in this line which demand recognition; our magnificent history; our splendid inheritance of patriotism; our rapid development; our advanced system of education, second to none in the world; our Kansas climate and our Kansas corn. This is but a partial list of the reasons why a Kansan has a lofty step and a solid tread.

There is one essential part of our government which has not received its due share of attention, that is the Judiciary. Notwithstanding the astonishing progress which has been made in every direction, our Courts are fully abreast of the times. The work of the Courts of Kansas for a third of a century has raised them to a most enviable position. Both as to system, personnel and results they stand on a par with the best in the country. What an encomium upon their integrity and ability is the exalted place they occupy in the public estimation of to-day. The Judiciary truly constitutes the chief bulwark of the state.

Holding so high an opinion of our Courts, as every lawyer does, we hope we shall not be accused of fault-finding if, in speaking of our Probate Courts, we find it necessary to make some adverse criticism as to certain matters in connection therewith.

The origin of our Probate Courts is lost in Anglo-Saxon antiquity. Having emerged from feudal times and taken shape through many years of experience, we find this jurisdiction exercised in Blackstone's time by an officer of the Ecclesiastical Courts called an ordinary. The basis of the jurisdiction of these Courts lies in the universal fact of death and the devolution of property. That central idea remains. In the transportation of our institutions

across the water from the mother country this Court took on diverse names, the Orphans' Court, Surrogate Court, Court of the Ordinary, Probate Courts and other titles. We all expect to die. We hope to leave large estates to be administered upon. But whether we have much or little when that supreme moment arrives, we shall undoubtedly leave all we have. Hence we have a deep interest in these Courts.

The details of the statutes of the states diverge widely, but the main jurisdiction is the same.

The attorney whose practice has led him among the records of our Probate Courts has the conviction forced upon him that they are not up to the standard which Kansas Courts ought to occupy.

The importance of this Court is not generally appreciated. Look for a moment at the work it has to do. The first and main branch of its jurisdiction is, the probating of wills and the care and management of the estates of deceased persons. This work alone should place the Court upon a high plane. The next subject of importance is that of appointing and supervising the guardians of minors, and persons of unsound minds, and the estates of convicts. The sacred writ of *Habeas Corpus* lies in its hands, concurrently with that of the District and Supreme Courts. The powerful weapons of injunctions and receiverships belong to it in the absence of the District Judge. In proceedings in aid of execution it has a power of great weight. Its Judge sits as Chief Justice in contested election cases. He holds inquests of lunacy, commits to the reform school, binds apprentices, adjudicates upon the rights of settlers on school lands, issues marriage licenses and performs that ever interesting ceremony. He issues permits for drug stores to sell intoxicating liquors, acts as the repository of the title of town sites, checks up the money in the County Treasury, performs the duties of the sheriff in certain events, brings suit for damages done to private burying grounds, hears the appeals of poor persons who have been remitted to another bailiwick, and of persons dissatisfied with the decisions in drainage matters, may take acknowledgements, and still the list is not complete.

These many and grave duties surely impose a great responsibility. To perform them calls for some person other than a good old man. They need a man of large capacity, deep learning and wide experience. With less than this the public welfare suffers. Is there any mind too well trained, too learned in the law, to fill the chair of Probate Judge in Kansas?

We are aware that when things come our way even in Probate Court we unite with the Jew in exclaiming:

"O Noble Judge! O excellent young man!"

"O wise and upright Judge!"

But the candid observer wishes for a higher standard than now exists in this Court of such extended jurisdiction.

The objections to the present condition of things group themselves under two heads; (1) Defects in the law, and (2) Defects in administration and procedure.

The constitution of the state provides for a District Judge and also makes the further provision for a Judge *pro tem*. But there seems to have been no idea that a Judge *pro tem* would ever be needed in the Probate Court. No method is pointed out for the selection of such an officer in the case of the disability or absence of the Judge. Hence it is thought in some quarters that under the rule of *expressio unius exclusio alterius* no *pro tem* Judge can be provided by the Legislature. This frequently brings on serious trouble. In one instance in this state the Judge became insane. Of course the Court stopped. A fertile brained Judge in another county cut the Gordian knot when he was sick by placing an ex-judge in the office who settled estates, sold realty, issued marriage licenses, etc. We have heard of another Judge of the State who signed up a lot of marriage licenses in blank and went to the Hot Springs.

Just what provision should be made to supply this deficiency will admit of discussion. In Vermont the Register of the Court may act in such cases. In Nebraska the County Commissioners appoint a Judge *pro tem*, while in New York the Circuit Judge is given jurisdiction in such emergencies. Other States have different ways of supplying the need.

The writer introduced a bill in the Senate of Kansas in 1895 conferring jurisdiction of all Probate matters upon the District Court in the absence or disability of the Probate Judge. The objection above mentioned was suggested that the provision of the Constitution conferring jurisdiction of all Probate matters upon the Probate Court was exclusive and the passage of the bill was not urged.

In our judgment the law relating to executors and administrators, guardians of minors and persons of unsound mind and trustees of the estates of convicts should be re-codified. In comparing the statutes and decisions of Kansas with those of other states we find so many changes and additions that should be made that mere amendments will not meet the difficulty. However, but few of them can be mentioned here.

Generally speaking the methods should be made more formal and the procedure should be better defined.

At present no petition or statement of facts of any kind seems to be required to call forth the action of the Court in assuming jurisdiction of an estate and appointing an administrator. This is certainly an anomaly in so weighty a matter. The jurisdictional facts should be set forth as in any other Court of a similar grade upon affidavit and an opportunity afforded interested parties to be heard as to whether an administrator should be ap-

pointed at all, and if so, who should be selected to perform this important duty. Particularly is this true if a creditor is making the application

In the matter of the payment of debts when the personalty is insufficient we now proceed immediately to sell the realty. Michigan allows the administrator to take possession of the real estate pending the settlement. While there are some states which permit the rental of the realty for a limited period to pay the debts if this can be done, and thus avoid its sale. This is undoubtedly a safe provision. It would in many instances preserve the real estate to the heirs and devisees. No lien holders are required by our law to be made parties to the proceedings for the sale. If any of the heirs are minors, they cannot represent themselves and the administrator is adversary to them under our decisions. No guardian *ad litem* is appointed for them. Yet in after years when the minor attains his majority and at the first opportunity at which he can appear, he attempts to enforce his rights, he is met with the objection that his claim is stale; that he cannot be heard to attack the proceedings collaterally unless he can show them to have been absolutely void. No irregularity will avail him. The innocent (?) purchasing creditor, who had in his employ the best of counsel to assist him in buying the land, hides behind the all-sheltering protection of the "presumption of regularity" and he is safe from all attack. Either appoint some one to make a genuine defense for this minor at the time of the sale, or allow him the same privilege to attack it on arriving at his majority that an adult would have had at the time. In the sale of the real estate of minors a detailed statement of the reasons why the sale is asked should be set out in the petition, and the reasons made the basis of the order. A close scrutiny should be made of the truth of the facts stated by appointing a referee, if necessary.

The Court should require security for costs from a creditor filing a claim against an estate, at least this should be done before he is allowed to contest it. One of the Probate Judges says that he requires such security as the law now stands. We cannot find any statute which in our judgment authorizes such a requirement. But surely no good reason can be given why a rule, which has proven so salutary in all other Courts, should not be applied in this one. An applicant for a guardianship of a person of unsound mind or person resisting an application to sell lands, ought to furnish protection to the officers and witnesses by giving security for costs. The question of the need of the security might be left to the discretion of the Court.

The policy of our law is to leave too much to the Court in this line of jurisprudence. More is required of him than in any other Court. He is the whole thing. He is supposed to sit as a judge, and at the same time to represent everybody, all antagonistic interests. Hence he transacts business without the proper notice to the parties interested. In many states notice of nearly every step is required to be given; of the application for the ap-

pointment of an administrator; of the time of the taking the inventory; of making the appraisalment, etc, Nebraska and New York are among the foremost in this respect. The notice required to delinquent administrators in Kansas is to be personal and if he abscond he may be summarily removed without notice. Would it not be better in such a case to allow service by publication? In Tennessee notice is authorized by mail, and in many states by posting on the Court House door. We would suggest that fuller notice be given to parties in interest and so much responsibility be not placed upon the Court in representing the different parties.

We have no statute authorizing the administration upon the estate of an absent or absconding person. If the stress of circumstances should force this to be done in this state and personal and real property be sold thereunder, it would undoubtedly all be held void if the absentee should return. The lack of some provision by which this may lawfully be done works a frequent hardship. Missouri allows an administration after the lapse of seven years, and Indiana, after the lapse of five years. All proceedings under such an administration are held binding in case of the absentee's return. Indiana also allows the guardianship of minors, the children of such absentees.

There is a very full statute in Ohio relating to the estates of insolvents. This very perplexing subject our law disposes of in half a dozen words. To apply our law to any given state of facts requires a vivid imagination and the aid of the "common law", that never-failing "cruise of oil" which supplies so many statutory defects. The conundrums arising under this class of estates are numerous.

Some way of ascertaining who are the heirs of an estate is needed more accurate than we now have. There is no section of our law which authorizes a formal inquiry as to who are entitled to participate in the distribution of an estate. A strange oversight is this. There should be notice to all concerned and an opportunity to be heard, and a finding and a decree upon the subject. The administrator now ascertains the facts as best he can and distributes at his peril. It would be a good plan, also, to institute some process whereby the heirs of a person could be ascertained for the purpose of establishing the title to realty. Every examiner of abstracts of title has felt the need of this.

What good reason can be given why a claimant should not have every facility to prove his claim against an estate the same as in any other Court? Now, he must get the consent of his opponent, the administrator, to take depositions, and must then take them at his own expense. If it is feared that he would abuse the privilege and put the estate to unnecessary expense, the consent of the Court might be first required. This would give the creditor his rights and at the same time place him under all needful restriction.

It is, however, when we turn to the chapter on guardians of minors that

we find the most glaring imperfections. The jurisdiction of the Court is not defined at all. Whether our Court can appoint a guardian over a Missouri minor, the Shawnee County Court over a minor resident in Sherman County, whether property or residence, or both, are needed to give jurisdiction are questions to be answered from some other source than the statutes.

After the guardian is appointed he may get along fairly well in most respects by following the law of executors and administrators. His steps are, however, uncertain and in the dark. He should be required to inventory and appraise the property of his ward, both for the purpose of sale if necessary and also to give the Court an adequate idea of the condition of the estate. He gives a bond that is likely to run a long time, several years, yet he is not specifically required to renew it, nor is there any means pointed out for an examination of the qualifications of the sureties from time to time. In the petition for the sale of the lands of minors the guardian must "state the grounds of the application". What these grounds are have not been defined. The Court may order the sale for any reason, or for no reason. In either event the minor is without adequate redress. The power of transmitting a minor's stable realty into fugitive funds should be kept closely within bounds. Indiana has a statute upon this question that is especially good. In one state the order for the sale of realty must have the approval of the Board of County Commissioners and then the sanction of the Circuit Court. The sale may then be made.

The chapter on guardians of minors and of persons of unsound minds and that on trustees of the estates of convicts should be consolidated. There would necessarily be some provisions applicable to each separately, but much could be adapted to all. This would simplify the statute materially without injury to its efficiency.

By the meagerness of the statute in many respects one is led into constructions and inferences and analogies, so that he may need the Scotch statute of 1427 to restrain him. It was as follows: That "na man interpret the King's statutes otherwise than the statute bearis, and to the intent and effect that they were made for, and as the maker of them understood. And quhasa dois the contrarie shall be punished at the King's will."

A comparison of the statutes of the different states shows many and diverse ideas about probate law. Some of them are most excellent and should be incorporated into our own. Others are questionable. Our statute as it stands has many points of superiority. Of course we all understand that the law, statutory and otherwise, is a definite thing which we are all supposed to know. But lawyers are so perverse that they *will* disagree about it. Courts of last resort spend a great deal of time in studying before they are able to give us a formal statement of what it is, and then the final promulgation of the "law" is often by a divided Court. That we could have the law "plainly

writ in a book" is the longing of every lawyer. The old arguments in favor of and against codifying are not to be gone over here. There is a fair medium between statutory enactments that are too much in detail, too cumbersome and complicated, and those that are too scant and too meager. We do not believe that our statutes fail in the former respect.

As a matter of administration our Probate Courts are characterized by a high standard of honesty and probity. Whatever may be thought of their legal learning those who fill the honorable position of Probate Judge in this state are men of sterling honesty and integrity. Justice, as they see it, is administered by them in the affairs brought before them for their consideration. But as judicial tribunals, exercising so wide and important a jurisdiction these Courts are open to serious criticism. Their method of doing business is too lax. In training and experience the judges are generally more skilled in some branch of business or in farming than in the law. Their papers are informal and their records sometimes confused. They believe they are capable of freeing themselves from the shackles of precedent, and of declaring the law applicable to each particular case independent of what some one else may have done in a similar one. They do not see that

"It will be recorded for a precedent,

And many an error, by the same example,

Will rush into the state."

One of the principal matters of oversight and neglect is that of making annual reports. These are not required of executors, administrators and guardians as is contemplated by the law. Upon a strict compliance with the provisions of the law in this respect depends in great measure the orderly transaction of the business of the estate. It requires a book-keeper of some ability to keep track of a series of annual reports, note their connection with the inventory and the sale bill, so as to be able to settle up matters accurately upon a final accounting. When these reports are not made regularly the confusion that arises is often inextricable. The law on this point is sufficient. The fault lies with the administration. In Missouri a fine is imposed upon a delinquent official who fails to respond to a citation to make settlement. All of the states, we believe, permit his removal, under these circumstances, but this remedy is not adequate in some cases.

In matters of so much moment as the sale of real estate the need of a close adherence to statutory forms is not apparent to the average Probate Judge. He feels his ideas of equity to be superior to the rules laid down by the legislature, and the precedents of the books, and acts accordingly. That such courts should sometimes become the victims of designing and unscrupulous attorneys goes without saying.

How it has been brought about that the legal profession has so small a representation on the bench of these Courts may be a matter of conjecture.

But we think that some of the reasons are to be found. When the Court of last resort solemnly announced that Justices of the Peace were not presumed to know the law, they opened a very Pandora's box of evils. By that statement they set a pace which it is but human to expect would be followed. A like low standard has been set for Probate Courts, not in express words but by the too free application of the rule of "presumption of regularity" to cure the defects in proceedings of this Court. Errors overlooked become a premium on carelessness and negligence. "Ask little, get little" is a saying that has much truth in it, and applies to Courts as well as to the general facts of life. The public understands that the requirements of the office of Probate Judge can be met by some good old man and hence he is the man they elect to that office.

I would like to see the standard of these Courts raised:

First. Make the office a salaried one. It does not comport with the dignity of the office that the Judge should be scraping around after ten cent fees for his compensation. The salary need not be a large one and might be gauged according to the number of inhabitants in the county.

Second. Let the procedure be made more formal and definite. Establish a more regular procedure and let the appellate Courts require a methodical transaction of the business. If this shall tend to a demand for men of legal learning to fill this office, well and good

This leads us to suggestion

Third. That lawyers be elected Probate Judges. That so few of our profession are elected to this high position is doubtless due to our well known and conceded modesty. In that most beautiful city of the world, our own Washington, are numerous parks and circles adorned with the statues of illustrious men. In the hall of statuary in the magnificent Capital are commemorated in enduring marble the most notable citizens of the several states. In all these there are generals and statesmen, but no one is there represented on account of his pre-eminence as a lawyer or a judge. To this general statement there are three possible exceptions, and they are notable ones. Looking down from the gallery in the reading room in the Library of Congress stand Solon, the law-giver, and Chancellor Kent, while at the west front of the Capital sits the heroic form of John Marshall. That so few of our profession are represented in a city governed by a congress that is made up largely of lawyers can only be accounted for by the fact that lawyers are of a retiring disposition. In the District Court where the litigants are generally shrewd business men, amply able to look out for themselves, the very best of legal talent is found sitting on the bench to adjudicate for them. But in the Probate Court, where against the avaricious creditor represented by able counsel are pitted the widow and the orphan, on the bench sits a man quite unfamiliar with the practice of Courts and with legal principles. The



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mere statement of the case compels a condemnation of the present condition.

We would not undertake to reform the world in a minute; we have made many suggestions but left many more unsaid. There will undoubtedly be a difference of opinion as to some of the propositions advanced. These matters have been put forth at this time in order to reach the ears of the most influential body of men in the Commonwealth. We have no doubt they will receive at your hands the attention that they merit.

But let us not forget the importance of the work done by our Probate Courts. The interests of the widow are in its hands. The orphan's rights are in its special care, and to its sheltering aegis are confided the wishes of the dead.

## THE LEGAL ASPECT OF TRUSTS AND THEIR CONTROL.

HUGH P. FARRELLY.

So much has been said, recently, and so much printed, in the columns of newspapers and in law books, upon the trust question, that I shall presume that this organization, representing the class of men who must solve the question, if ever solved, would expect but little new from any member, and certainly nothing new from me.

While I have not prepared nor do I design this paper to be a brief on this subject, yet the language here used will be, very largely, the language of others. Neither do I intend to go into ancient history, but deal with the living present, as the trust of today is not that of yesterday, nor is its objects, aims and intents what it used to be.

"An organization of persons or corporations, formed mainly for the purpose of regulating the supply and price of commodities," is perhaps as good a general definition as can be found in the books, and yet, to fix a legal status, or portray a "legal aspect", if such were possible, it is necessary in my judgment, for the law-making body to define it much more definitely, and as time passes and the ingenuity of man developes, to broaden and extend the statutory definition and deal with it accordingly, if we hope to "control them".

And yet it would seem that independent of statutory provision and upon the broad grounds of "public policy", control thereof might be effected. But the indefiniteness and uncertainty of this rule render it so liable to abuse that it is doubtless wise to deal with trusts by legislative enactment.

Public policy varies with the habits and fashions of the day, with the growth of commerce and the usages of trade, hence the thing which we desire to control might usurp, so to speak, our public policy, as a state or government, unless directed by legislative enactment, and thereby become a fixed part of that great bulwark of American liberty, when in the hands and under the administration of a just and cautious chancellor.

The growth of commerce and the usages of trade are great instrumentalities of education, and to them the legislative department of government may

also yield, but for it to deal with the subject directly, seems to be the settled policy of our several states and the Federal Government.

As the trust has grown and forced itself into conspicuous prominence in the business world, so has legislation kept a tardy pace therewith,---just a little behind, as a rule, ---but these two great powers, the trust and the government, are now entering the head of the home stretch in the great race for supremacy, and in my judgment, if the driver of the government nag keeps a cool head and wields the lash in a manner becoming to Uncle Sam, he may maintain that familiar smile, while his coat tails may blind the eyes of his adversary as he goes under the wire.

Trusts, as they now exist, and for the purposes for which they are now formed, have no "legal aspect"; they are illegal, and have been uniformly so held by the courts. They are contrary to all statutory enactments on the questions, contrary to public policy and repulsive to any reasonable conception of right and justice.

Until quite recently, the manner of their formation might be divided into about four classes or heads:

A co-partnership of corporations in the form of a joint stock company.

A corporation that owns the stock of other corporations.

A corporation that buys or leases the property of others in the same line of business.

Organizations created for the purpose of regulating and controlling the private enterprises and business of its members.

It will be observed that it is through corporate organization that trusts are usually formed, and can only be formed to any great extent, and the latest scheme, thought to be invulnerable, by many, and defended by some gentlemen of high standing, is that of organizing a vast corporation, thereby absorbing and obliterating all other interests or organizations connected therewith or forming a part thereof.

Corporations being creatures of the law, may be subjected to many provisions of law, not applicable to natural persons, under many conditions and circumstances. The constitutions of many states, including Kansas, provide that corporations may be organized only under general laws, and that such laws are subject to amendment and repeal. Some states that have not such a constitutional provision have a general statute of the same import, and in either case, the corporation, organized after the adoption of such a provision, is absolutely subject to the sovereign power of the state, exercised by its legislative department.

Says Judge Cooley: "Corporate franchises are granted on considerations of state policy, and they may be taken away upon no other reason than the legislative view of state policy has changed. At one period we deem it

wise to create state banks of issue; at another, we look upon them as needless and proceed to legislate them out of existence."

Where such a provision is contained in the constitution, says the Supreme Court of Maryland: "Every charter thereafter granted, even though it contained no reservation of the right to repeal or alter it, was subject to this paramount provision of the organic law". The Supreme Court of Alabama has adopted the same view, and holds still further that such "does not offend the constitutional inhibition of laws impairing the obligation of contracts".

The Supreme Courts of California and Rhode Island hold, likewise, and on the question of the obligation of contracts, uphold a law changing the liability of stockholders. In line with this doctrine, we find Massachusetts, New Hampshire, Wisconsin, and even New Jersey, where it is said that more trust corporations have been organized than in all the balance of the states. Such is the rule without exception, so far as I am advised, generally adopted, by the several states, as their courts of last resort are called upon to pass upon the question, and they are sustained by the Federal Supreme Court.

While the Supreme Court of Kansas has not passed upon the question, directly, it seems to have been taken for granted, and expressions of that body indicate clearly that when called upon to pass on the question directly, it will so hold.

Speaking of that question or provision in the constitution of a state, I quote from one of the most recent expressions of the U. S. Supreme Court: "It is a provision intended to preserve to the state, control over its contract with the corporators, which, without that provision, would be irrepealable, and protected from any measures affecting its obligation".

With this power in the state, I see no reason why any corporation can not be controlled, and can not be required to conduct its business in a manner entirely satisfactory to the people of that state, or be deprived of its right to do business in that state.

It therefore follows, it seems to me, that the state, by the enactment of wholesome laws, can absolutely control the organizations of this character, created under its laws, and can certainly dictate terms upon which any foreign corporation may do business within its borders, and I will suggest in this connection, that in my judgment, there are more and greater reasons why the several states should enact "uniform laws" upon this question, than upon any other that has been suggested, since uniform legislation has been attempted or advocated.

During the year 1899, quite a number of very important decisions upon the trust question were rendered. One of the most important, bearing directly upon the right of individuals doing, through and by the agency of an immense corporation, what they could not otherwise do without violation of

the law, was rendered by the St. Louis court of appeals. It strikes directly at the most recent scheme of the trust, and the language used by the Court is very significant. In the Central Law Journal of August 11, the case is commented on at length, and copious extracts are quoted from the opinion. Among other things, the Court said:

"A corporation can only act through its members or their agents. The corporate entity with which the law clothes it for special purposes is not self-acting, hence there was no thought of its action only, in the mind of the framers of the statute. The evident purpose of the legislature was to specify certain acts, which, if done by its stockholders, or governing bodies, should constitute a crime on the part of the corporation. It did not contemplate the commission of an offense by an impalpable abstraction, which could neither think nor act, but it intended to bind this corporate entity by the imputed actions of its human agencies. In other words, the legislature referred to the corporation in its true essence as an association of persons without which it could not exist, and through whom alone it must perform all its functions as a corporate being."

"Hence it must follow that if the stockholders and governing officers of the plaintiff corporation combined with each other to violate any of the provisions of the section under review, through the instrumentality of their corporate entity, then the corporation composed by them was a party to such illegal combination, within both the letter and spirit of the law."

"Or, correctly stated, that a combination which is illegal under the anti-trust law can not be operated under the cloak of a corporation, by its constituent members of governing bodies. This conclusion is believed to be irresistible in reason and has received the unwavering support of the courts and the text writers." Citing many authorities, including one from the Supreme Court of Illinois, as follows: "The corporation, as an entity, may not be able to create a trust or combination with itself, but its individual shareholders may, in controlling it, together with it, create such a trust or combination that will constitute it, with them, alike guilty."

Ford vs. Milk Assn. 155 Ill. 166.

Probably the most important decision rendered by any state court upon this question is the one known as the Glucose case, by the Supreme Court of Illinois, in December. I have, I hope, a pardonable pride in referring to this decision,—Illinois being the state of my birth, and that body being the first tribunal, authorizing clients to jeopardize their rights by placing them in my hands.

In this decision, the court upholds the doctrine laid down in the case above cited, enforces the statute of the state, calls to its assistance the rule of "public policy" and protects a citizen of that state,—a stockholder in a cor-

poration thereof, by enjoining the Illinois corporation from entering a New Jersey trust corporation.

The public policy of Illinois, says the court, has always been against trusts and combinations organized for the purpose of suppressing competition and creating monopoly.

It makes no difference that the agreement for the illegal combination is not a formal written agreement. It may be verbal, or by understanding, or a scheme not embodied in writing, but evidenced by the actions of the parties. Quoting from the opinion:

"The material consideration in the case of such a combination is, as a general thing, not that prices are raised, but that it rests in the power and discretion of the trust or corporation taking all the plants of the several corporations to raise prices at any time it sees fit to do so. It does not relieve the trust of its objectionable features that it may reduce the price of the articles which it manufactures, because such reduction may be brought about for the express purpose of crushing out some competitor or competitors."

"It makes no difference whether the combination is effected through the instrumentality of trustees and trust certificates, or whether it is effected by creating a new corporation and conveying to it all the property of the competing corporations. The test is whether the necessary consequence of the combination is the controlling of prices or limiting of production or suppressing of competition in such a way as thereby to create a monopoly. Necessarily, when corporations when thus situated unite together all their properties in one new organization, and permit the latter to operate their properties, competition will be suppressed, and the new corporation will possess the power to limit production and control prices."

There is no question as to the power of the several states nor of the disposition of the courts to enforce the laws relating to trusts. The court decisions are numerous, and with scarcely an exception, have held trusts and combinations in restraint of trade to be void, and when the trade pertains to the necessities of life, I think there can be no case found where a trust has been sustained in any particular,—such a trust as we have today and of which we are presumed to consider at this time.

The United States Supreme Court in many cases has held to be void trusts and combinations in restraint of trade. The most recent utterance of that body upon the question, and doubtless the most forcible and explicit opinion yet delivered by it, is the case of "Addyston Pipe Co., et al., vs. United States", in which the trust contract and agreement between the manufacturers of iron pipe was declared to be illegal and void, on the ground that it was in contravention of and obstructed inter-state commerce. This opinion is far-reaching in its scope, and it seems to me is the strongest decision yet

rendered, from a Federal standpoint, and indicates the extent of co-operation by the Federal government with the states.

In this case, the several defendants entered into an agreement that no pipe should be sold within a certain territory, embracing several states, except upon the terms provided in the contract, thus interfering with inter-state commerce, as held by the court. I quote the following very significant language from the opinion: "What sound reason can be given why Congress should have the power to interfere in the case of the state, and yet have none in the case of the individual? Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried on among the states, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce."

This seems to settle the right of private contract question, so often suggested and discussed in connection with the trust question. Again quoting from the same opinion:

"While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon inter-state commerce in respect of articles manufactured by any of the parties to it to be transported beyond the state in which they were made."

"The defendants, by reason of this combination and agreement, could only send their goods out of the state in which they were manufactured for sale and delivery in another state, upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, was not this a direct restraint upon inter-state commerce in those goods?"

It seems to me quite plain, under the decisions of our state and Federal courts, that the state can completely control trusts, as to their operations, contracts and manner of doing business within the state, that uniform legislation thereon would greatly facilitate the enforcement of the law in the several states, and that congressional enactment will take care of the question as between the states.

Many states have good anti-trust laws now. Congress some years ago passed an anti-trust law, and these laws need amendment from time to time, just like all other laws on important questions. A thing so energetic, backed by so much wealth, avaricious as it always is, arrogant, and indifferent to the

rights of the people,—seeking, not to save souls, but to make money, is a thing not easily managed, hard to keep pace with, and ever ready to break in when an opportunity offers.

I believe, however, that the principal thing now necessary to control the trust is the enforcement of law. It matters not how many laws we have, but what are enforced. I believe that the attempted enforcement of law against trusts has been simply to a point necessary to get judicial construction, and but very few cases seem to have had much attention after a judicial termination of the validity of the law. This is too often the case with all laws of importance. In the state of Kansas, the prohibitory law was vigorously enforced for a few years, until the courts sustained practically all of its provisions, and then it is said, the enforcement thereof has been practically abandoned in many places. I think this is very largely the case relating to the anti-trust laws of the several states and the government. We frequently hear of a case in this, that or the other court, wherein an anti-trust law has been held good, and enforced in that particular case, and thereafter the trust continues to operate, the same as before, without interference.

I think the legislative and judicial departments of government, generally speaking, have discharged their duties reasonably well in the several states and in the Federal government, and if the executive department of government will enforce the laws rigidly which we now have, the defects therein, when so found, will be promptly remedied by the other departments.

The conclusion I have therefore reached is that the trust has no "legal aspect", and it may be "controlled" by enforcement of the law.



## THE LEGAL ASPECT OF TRUSTS AND THEIR CONTROL.

W. H. BOSSINGTON.

*Mr. President and Brethren:*

In honoring me with a request to address you today, the President of the Association has taken occasion to twice inform me by letter that I was not expected to occupy more than thirty minutes of your time. It was considerate upon his part, both for your sake and my own, and I might with satisfaction to both myself and my audience occupy a much briefer period if I had any new message to deliver in the way of solving this, which many regard to be the foremost problem of our times.

In the time limited, which I promise not to transcend, there is obviously no chance for any wide sweep or satisfactory detail of argument upon the subject or for even doing more than to state in a cursory and suggestive way the current ideas upon the so-called "trust" and the remedies and expedients to be applied to correct it if it should prove to be an evil. It is important that whatever we say here shall be from the point of view of the lawyer, for to the lawyers in the legislature, on the bench and at the bar will be ultimately committed the determination of the means for the regulation of these great combinations if they shall be allowed to continue, or to abate and destroy them if, as the alarmists fear, they shall menace the safety of the republic or the welfare of the people.

The theory of economics which lies at the base of the so-called "trusts" is nothing new. It is a theory which has struggled for supremacy in the commerce of the world for centuries. There have been always in the domain of trade two antagonistic forces; one favoring association, co-operation, control if possible to the end of regulating prices by an even distribution of commodities exposed to sale; the other striving to thwart this purpose by bringing about local congestion of products as the result of unrestrained and unlimited competition. The constant interaction of these forces produces alternately a sellers' and a buyers' market. "It is naught, it is naught" saith the buyer," is the spirit of one, while the other, like Alnaschar with his

stock of pottery in the Arabian tale, dreams of that local scarcity and consequent demand which leads to sure and large gain. The advocates of one theory insist that competition is the life of trade and should be unrestrained; the advocates of the other theory believe and assert that unrestrained competition tends to the ultimate destruction of trade by depriving it of its hopes of just and reasonable rewards.

In the earlier stages of the struggle, say 350 years ago, the advocates of unrestrained competition had the best of it. It was then embodied in the substantive law of Great Britain that those who had made or purchased something more than was required for their own needs, and therefore had it to sell, had no right to enhance its value by any act or default of their own in bringing it to or exposing it in market. Particularly, that no intermediate dealer, or as we call him nowadays, no "middleman" could by any enterprise or foresight get any advantage to himself by purchasing on the way to market or hindering the immediate sale of any product by buying it to sell again, or otherwise.

The name "trust" in the sense we use it here was first invented and applied in this country to a voluntary combination of partnerships or corporations or both, which, while retaining the ownership of their respective plants or businesses, surrendered the control of them to a central authority which should act and deal for all upon a guaranty of fixed returns. Since Judge Barrett's decision in the North River Sugar Refining Company case and other cognate decisions, holding that corporations were powerless to make such contracts with each other, this theory of commercial co-operation was abandoned. To the discussion which then arose with reference to this form of trusts among lawyers and in the public prints, one of the most notable contributions was that of the late Theodore W. Dwight, the principal of the Columbia Law School. His argument proceeded upon the theory that inasmuch as the early British statutes, notably the 5th and 6th Edward the VI, had been repealed before our revolution and did not become a part of our common law and that the course of common law in this country had never established the principles of those statutes, the organizations called "trusts" were, in the United States, both permissible and lawful provided they did not amount to an actual monopoly of a particular product.

This theory of the law seems to have been accepted, because it was found necessary in many of the States of the Union and in the Congress of the United States to enact statutes against combinations of this character. The British statutes last referred to denounced certain offenses against trade which were named in the vernacular of the period as "regrating," "forestalling," and "engrossing." The preamble of this ancient law is curious and instructive:

"Albeit divers good statutes heretofore have been made against fore-

stallars of merchandise and victuals, yet for that good laws and statutes against regrators and engrossers of the same things have not been heretofore sufficiently made and provided, and also for that it hath not been perfectly known what persons should be taken as a forestaller, regrator or engrosser, the said statutes have not taken good effect according to the minds of the makers thereof."

It is palpable from this preamble that the statutes referred to were of that character which have ever been found to be largely inoperative and non-enforceable as denouncing things as *mala prohibita* whom those subject to such statutes could not be convinced were *malum in se*. It is curious to see from this statute the nature of the offenses thus created and prohibited. An engrosser was defined to be one who acquired "by buying, contracting, or promise taking, any grain, butter, cheese, fish, or other dead victuals whatsoever with intent to sell again." This description would seem to include the whole class of middlemen. A forestaller was described as one who bought goods which were being conveyed to market and before they got there. A regrator was a malefactor who bought in any market the things sold there and which had been there brought and exposed to sale and then sold the same again at the same market or at any other market within four miles therefrom. Heavy penalties were by the acts inflicted for these offenses. Upon a third offense the offender was to be set upon the pillory, forfeiting all his goods and remaining in prison during the King's pleasure.

These statutes made ostensibly for the purpose of securing complete competition had the effect of all such statutes, viz: to hamper and suppress trade and injure those engaged in it, and in consequence to injure the people at large instead of benefitting them. Constant efforts were made to enforce the statutes by the infliction of grievous penalties until some time during the reign of George I they were repealed.

Another popular outbreak against the methods of trade in the succeeding reign caused the re-enactment of these laws with like results, until in the 12th year of the reign of George III they were finally repealed. Even after this second repeal the judges of England sustained prosecutions of the offenses denounced by the repealed statutes, holding them to be offenses under the common law. Finally, in 1854, parliament passed an act which withdrew the last vestige of power from the judges to entertain charges of or punish such offenses.

The preamble of this last named act illustrates the point we make that all such regulating statutes injure trade and traders and along with them the public sought to be benefitted. It is as follows:

"Whereas, divers statutes have been from time to time made in the Parliaments of England, Scotland, Great Britain and Ireland, respectively, prohibiting certain dealings in wares, victuals, merchandise and various commodities, by the names of badgering, forestalling, regrating and ingross-

ing, and subjecting to divers punishments, penalties and forfeitures persons so dealing. And whereas, it is expedient that such statutes, as well as certain other statutes made in hindrance and in restraint of trade, be repealed: And whereas, an act of the Parliament of Great Britain was passed in the twelfth year of the reign of King George the Third, entitled an Act for repealing several laws therein mentioned against badgers, ingrossers, forestallers and regrators, and for indemnifying persons against prosecutions for offenses committed against the said acts, whereby, after reciting that it had been found by experience that the restraint laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the said commodities, have a tendency to discourage the growth and to enhance the price of the same, which statutes, if put in execution, would bring great distress upon the inhabitants of many parts of this kingdom, and in particular upon those of the cities of London and Westminster," etc.

And I might say here as a lawyer in this company of lawyers that no prohibitive statute can be ever made effectual to interfere with or prevent a general trend of commerce growing out of a natural evolution from conditions and necessities of those engaged therein. Congress and legislatures can make laws at will, but those laws must respond to a practically universal, popular sense of their necessity and justice to be enforceable. I am not speaking of laws relating to the public revenues. Those to be affected by the latter may regard them as oppressive and unjust, but there is a universal and abiding sense that the necessity for such laws resides in the very frame work of government, which will justify and uphold them. There is not and never will be an abiding sense that government has a right to intrude into the methods and expediencies of private business if the same be not immoral or against public policy.

In England since the passage of Twelfth Victoria, and in this country at all times, the evolution of trade and of trade methods has been unobstructed and unembarrassed by substantive law. There is, of course, a vast body of law resting in the principle of public policy that has grown up by resistance to contracts affirmatively shown to be in restraint of trade. There are two substantial principles involved in this body of law; first, that no contract is permissible which withdraws from society for all time and in all places the active efforts of any individual. Second, that no contract is permissible which results in a monopoly. And I might say here that the monopoly that is denounced in our early constitutions and ordinances is not the monopoly that is in the minds of those who are at present anticipating the supreme danger from trade combinations. The monopoly that our fathers had in mind was a privilege that came not from the efforts of the individual enjoying it, but by gift and grace from the Crown, or from the government in the exercise of prerogative. The monopoly that is denounced by all of our early writers is that which is illustrated for example, in the exclusive right to sell

sealing wax to the government enjoyed for so many years as a gift from his own father when Prime Minister by Horace Walpole. The possibility that by the unaided efforts of an individual he could so aggrandize his power in the struggle and stress of commercial life as to engross and absorb a particular commodity throughout the breadth of a realm or nation, never entered into the minds of our early law makers. It was deemed to be possible that this might be done in a limited area by making contracts and agreements which would result in the suppression of all those engaged in a particular trade and calling in one locality and such contracts as between the parties making them were held to be bad as depriving the public locally of the fruits and benefits of competition. But the law has been guarded in stating and enforcing such a rule. Unless it could be demonstrated that the contract would result in depriving the local public of the benefits of competition it was held not to be against public policy and good between the parties; in brief, the law has never been unfriendly to the accumulation of that intangible but highly valuable element of property known as good will, although such contract in and of itself tended to a monopoly of a particular business and trade and to a limitation upon competition.

No intelligent and honest observer can fail to admit that for more than a generation last past there has been a constant, uniform and ever widely extended effort to accomplish by co-operation a cessation of destructive strife in business, and it has been confined to no one business; it has been characteristic and the chief and marked characteristic of all. We all know that there have been understandings in every locality among lumber merchants, among dealers in grain and flour, among contractors even, to uphold prices and to establish uniform standards of the same. It is more than twelve years since I was called in counsel to pass upon an agreement between certain wholesale grocers in this and the neighboring state of Missouri, with reference to the maintenance of prices. It was before the passage of any of these anti-trust laws and contained among other things an agreement that certain punishment should be visited upon those who violated it, and I had to tell them that under the law as it stood, each being an independent dealer, and the public entitled to the services of all, the contract was not enforceable according to its terms; that such a contract might be made and so long as it was voluntarily kept the public would have and could have no necessity to interfere with it, but it could not be made with penalties against the violator.

A vast number of manufactured commodities have been for years sold to jobbers under written contract at a delivered price, the purchaser to receive a rebate if he sold them at a fixed value to his customers, and not to receive such rebate if he violated the agreement. I have reason to know that when I built my first house twenty years ago there existed a compact among the lumber dealers in this city of Topeka to sell at the same price and that com-

pact was so effective that it made little difference from whom I purchased my material.

It is also known of all men that certain individuals and combinations of individuals constituting a few leading firms and corporations, by their skill and enterprise, and by the uniform merits of the goods which they produced have been able to fix and control the market in the commodities in which they dealt or which they manufactured, for all the rest of the trade, either in their locality or in the country at large. And I take it that no one will gainsay the proposition that if the factors which enter into the production of any commodity could be fairly and justly set down, that labor should have its just reward and share, both in the production of the raw and the manufactured material, that capital should be compensated not only for interest on the amount invested, but for waste and destruction in the means used, and that there should be added unto it a reasonable and just profit for all skill and devotion essential to bring it into the consumers' hands, and that this was an ascertainable thing. such reward or profit or what you will, should be if possible insured in all instances without exception.

But commerce, like most of the active relations of man with man upon this planet, is war, and war has as a necessary incident its innumerable tragedies. I assume that no one of you will deny that if this war can be averted and that as a result each shall have his just meed of reward and no more, that this is a thing to be desired rather than to be feared. But there are those who assert and there are even those who undoubtedly believe that inasmuch as out of modern conditions, as for example, the annihilation of time and space by the growth and development of transportation facilities; the unification of the markets of the country and the rapid and direct interchange of the results of all human efforts here and abroad; in brief, by the almost miraculously produced facilities for wide extended, easily manipulated and securely controlled co-operation, capital has found its opportunity by large combinations to prevent destructive competition, it will use that opportunity to make a desolation and call it peace; that a new imperator is thereby to be crowned that will rule the world and all that therein is more absolutely than Caesar Augustus did the Roman Empire and the great mass of humanity will be reduced to serfdom; that the individual man will cease to be a factor by deprivation of opportunity for initiative and personal achievement; that a great many other dire things will happen and that they are happening in our eyesight today and that these combinations should be forthwith swept away with a besom of wrath.

I do not say here that the latest and most successful development of that which has been going on under our eyes all our lives is altogether a good thing. There may be evils and doubtless will be, resulting in the greed and selfishness of the individuals managing these corporate bodies, but I have

not now nor have I ever had any sense of disquietude that such evils may not be both corrected and punished, and I am one who believes that any injuries which may result which are not incident to this change of system will visit their own punishment upon those who commit them in a material and substantive way.

The first form of this co-operation above adverted to which has now been abandoned, was miscalled a "trust"; it had no element of a trust about it. Its later evolution, namely, the formation of a corporate body which does actually own and manage vast properties, is in the highest sense a trust. By taking the corporate form it does not avoid responsibility, but invites it. It renders itself amenable absolutely to legislative control.

There is a great deal said about the power of such organizations. My knowledge and experience as a lawyer show me exactly the contrary. An individual may carry on his private business without intrusion or oversight and may resent both as against his right. A corporation cannot long do this. It is a big sprawling monster easily assailable from all points and subject to constant fear and disquietude.

This culmination of a long continued trend of commerce is either good or evil to its promoters and to the world at large. It cannot be good to its promoters if it be evil to the public. It is a trust, therefore, in the highest sense, and I cannot help in some degree sharing the optimistic view of the socialists who see in it the preface to a united ownership, production, and just and equitable distribution among all men of all the fruits of human effort.

But we are to look at this, as I have said before, not as politicians, not as economists, but as lawyers. There have been a number of efforts made to legislate upon the subject, and statutes of the most sweeping character and of the heaviest penalties have been so far practically abortive. I think it was Burke who said, in his famous oration vindicating our revolutionary struggle, that he found it difficult to draw an indictment against a whole people. The entire people of the United States outside of the farmers and professional men, are in some degree directly related to commerce, and the great mass of this large segment of our people are actively related in some way to these recently formed combinations of trade and manufacture. We have not heard from them, but it is fair to assume that they are true to their alliances. We cannot sweepingly denounce all these people as criminals, unpatriotic and meaning harm to the republic. If they should prove to be, the armory of the law abounds in weapons adequate to prevent and to punish.

Let us assume then for a moment that this formation of trusts is a thing of evil wholly; that in the language of Hamlet it is "*niching mallecho* and means mischief." How can we deal with it under our system? I insist that whatever concrete evils are shown to exist as a result of these trusts will be

found to be remediable by the common law no matter how powerful the trust may be. Assume it to be true that its incidental and potential evils are so great that it should be abjured and destroyed by the strong hand and without reference to any incidental benefit that its advocates and friends plead as its justification. How may this be done under our constitution and system, having in mind that principle which lies at the foundation of all civilized government; namely, the right of private property. I approach this problem not as a social one, but as a legal one purely. Of course, if one shall insist upon either of the propositions, namely, that a millionaire has no right to exist; that his millions shall be distributed and that his right to contract with reference to the potency of his possessions is to be denied, then there is an end of argument so far as the legal phase thereof is concerned. But, as I said, we are viewing this from a lawyer's standpoint. So far we have played at hide and seek in our legislation against trusts owing to our dual form of government. The Sherman law was enacted by congress. Laws quite as denunciatory, vigorous and sweeping have been passed by many of the states. We have had a great deal of rhetoric and a great many resolutions and both of the great political parties are vying with each other in their opposition to trusts, but so far the trusts remain unharmed and they are formed apparently with a perfect sense of security on the part of their promoters of their being perpetuated. The rod in pickle which the future seems to have for the trusts is one of its own making and is to be visited upon all whether innocent of evil intent or not who have by their investments and co-operation enabled them to exist at all. It is obvious that as soon as the present period of active material productiveness shall abate in this country, the first who will feel it most acutely will be the substantial owners of the money involved in these very trusts. The principle of co-operation, which as I say is the result of a long continued trend of commerce, is so attractive, its beneficial results so palpable that it was easy to induce investments therein upon a most optimistic and absurd basis which every one feels and knows cannot be realized. It does not follow that the rude awakening which will soon come to those investing will destroy the organization; it can only be destroyed by law; it is here. The temptation upon the part of those having control of these properties will then come, and will be hard to resist, to use their power against the public interest to maintain revenues, and if possible to retrieve losses. It was admitted by Mr. Bryan at the Chicago conference that there is at present no such thing as a perfect trust in any commodity; no such thing as an absolute monopoly. If these trusts shall then or at any time endeavor to use their power to the palpable detriment of the public, one of two things will happen: First, adequate and efficient laws will be passed, either by congress or the states, to regulate and control them, or, which is the natural and more probable result, the very individuals who have been



brought into the co-operation and who have been furnished with large capital by trusts in payment for their separate properties will use their knowledge, their leisure and the means acquired from these combinations to build up antagonistic enterprises which shall bring about again all needful and healthful competition.

I said advisedly that these institutions were trusts because their maintenance of reasonable profits depends upon the faith and belief of the people that their profits are reasonable. If they should prove to be unreasonable, they would invite their own destruction.

But as to legislation. As I have said, laws have been passed by congress and by the states. The state laws are inefficient for two reasons: First, a law to exclude goods manufactured by a trust, if constitutional, which is more than doubtful, would injure the citizens of the state quite as much as the trust, and a trust itself is not amenable to punishment save in the state of its creation (either New Jersey, West Virginia or Delaware) where the laws give it full power to carry on the business in which it is engaged. The Sherman anti-trust law has been held to be a valid exercise of the power of congress and to be applicable to combinations and associations of railroads for the maintenance of rates. In the case referred to, namely, the case of *United States vs. Trans-Missouri Freight Association*, 166 U. S. 290, the court lays down a principle which defines not only the power of congress in this behalf, but the power of state legislatures within the limits of the peculiar legislation of each. It was urged in the *Trans-Missouri Association* case that the contention of the government tended to violate the guaranties of the fifth amendment to the constitution. In reply to this proposition the court (Mr. Justice Peckham.) says:

"The latter limitation is, we think, plainly irrelevant. The question which arises here is whether the contract is a proper or lawful one, and we have not advanced a step towards its solution by saying that the citizen is protected by the fifth or any other amendment, in his right to make proper contracts to enable him to carry out his lawful purposes. \* \* \* Notwithstanding the general liberty of contract which is possessed by the citizen under the constitution, we find that there are many kinds of contracts which while not in themselves immoral or *mala in se*, may yet be prohibited by the legislation of the states or in certain cases by congress. The question comes back whether the statute under review is a legitimate exercise of the power of congress over any state commerce and a valid regulation thereof. The question for us is one of power only and not of policy. We think the power exists in congress and that the statute is therefore valid."

In a subsequent decision, namely, the case of *United States vs. E. C. Knight*, 166 U. S. 1, the scope of this statute is limited and held not to apply

to prevent the American Sugar Refining Company from acquiring the ownership of certain refineries in Pennsylvania, the fulfillment of the contracts for which would tend to a monopoly of the product. The court says:

"The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of congress in the mode attempted in the bill."

And the court held that it could not, and in the subsequent case, *United States vs. Trans-Missouri Freight Association*, 166 U. S. 826, held that the Sherman act applied to monopolies in restraint of inter-state or international trade or commerce, and not to monopolies in the manufacture of even the necessities of life confined to a state.

Now, it seems to me very clear that congress may legislate notwithstanding the decision in the Knight case, with reference to inter-state commerce originating by shipment from a corporation which has acquired a monopoly, or substantially a monopoly, or whose relationship to the business of like character in other states besides the state of its creation tended to the creation of a monopoly in such a way as to limit, control, or wholly destroy such business by dealing with the product in transit or with the inter state railroads engaged in its transportation to compel the dissolution of the trust. All that the Knight case decides is that congress has not by the Sherman act conferred upon the Federal courts power to prevent the creation of a monopoly in a product. It does not say that congress may not exercise its power to prevent such monopolistic organization from enjoying the privileges and power of commerce between the states, or with foreign countries. There is nothing to prevent congress dealing with such product belonging to such monopoly wherever it may be with reference to its inter-state distribution, and I know of nothing in the Knight case in careful reading of it that tends to limit the power of congress in this behalf. I do not think that any amendment to the constitution of the United States is necessary to confer this power upon congress. It can forbid if it pleases the inter-state transportation of goods and commodities owned by a corporation or trust which monopolizes the particular commodity, or it can put any other form of embargo it pleases upon such transportation in pursuance of the public policy to destroy such monopoly. And this would also be within the reasonable exercise of such power, because it would prevent such monopoly or combination from interfering with the free production of commodities in all the states of the union and the free transportation between the same.

I do not believe in any limitation either of the power of the particular states to create and control their own corporations in their own way, or in an amendment to the constitution of the United States which shall confer upon

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congress the right to invade the province of the states in this behalf. I believe that if it is thought wise and best to destroy these combinations if they shall turn out to be evil and not good, if they shall be a menace to the liberty or the material welfare of the citizen and a corrupter of the political morals of the republic, that they may be effaced and destroyed by congress within the terms of its power to regulate inter-state commerce and by a carefully drawn additional section in that behalf added to the Sherman act. Certainly I am not in the ranks of the gloomy and pessimistic brood who believe, or affect to believe, that if we do not destroy these trusts they will destroy us.

## TREASURER'S REPORT.

*Topeka, Kan., Jan. 30, 1900.*

To the Bar Association of the State of Kansas.

Howel Jones, Treasurer, begs leave to make the following report:

### RECEIPTS.

Amount received from A. A. Godard, former treasurer..	\$314.81
Amount received from dues of 1898.....	90.00
Amount received from dues of 1899.....	426.00
Total.....	<u>\$830.81</u>

### EXPENDITURES.

1899.

Jan. 28. Hotel Throop (banquet).....	\$166.50
C. J. Brown, postage, express and freight.....	27.20
C. J. Brown, music for Asso., janitor and hack.....	20.00
Incidental expenses of banquet, Howel Jones.....	103.50
Reed & Son, rental of 350 chairs.....	10.50
Hall Litho. Co., printing letter heads and blanks.....	10.50
Printing circular letter and 200 postal cards.....	2.90
Stamps and postal cards.....	3.10
C. B. Graves, incidental expenses....	<u>10.00</u>
Amounts forward.       -       -	<u>\$354.20-\$802.81</u>

Amounts brought forward, - -		\$354.20	<del>\$802.81</del>
Apr. 12.	Mail and Breeze, printing.....	12.50	
	Hall Litho. Co., 250 letter heads and circulars .....	3.75	
	Postal Stamps.....	1.00	
May 1.	Clerk hire.....	5.00	
June 6.	Clerk hire.....	5.00	
	Stamps for notices of dues.....	3.00	
	23. Circulars for payment of dues.....	3.00	
	Envelopes.....	1.75	
Oct. 2.	Wrappers for sending out Proceed'gs.	.75	
1900.			
Jan. 5.	Postage stamps.....	2.00	
15.	Hall Litho. Co., 100 circulars .....	1.80	
	Postage .....	.59	
19.	Postage .....	1.00	
	Preparing circular and making reports.	5.00	
	Hall Litho. Co., circulars.....	2.00	
	Stamps .....	1.00	<u>403.34</u>
	Amount on hand.....		\$427.47

Hereto attached are the names of the persons who paid  
dues for 1899.      Respectfully submitted,

HOWEL JONES, Treasurer.

## CONSTITUTION.

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ARTICLE 1. The name of the Association shall be The Bar Association of the State of Kansas.

ART. 2. The object of the Association shall be the elevation of the standard of professional learning and integrity, so as to inspire the greatest degree of respect for the efforts and influence of the bar in the administration of justice, and also to cultivate fraternal relations among its members.

ART. 3. The officers of the Association shall be a President, Vice-President, Secretary, Treasurer, and an Executive Council of five members.

ART. 4. The President shall preside at all meetings of the Association, and shall open each annual meeting of the Association with an appropriate address. The Vice-President shall preside in the absence of the President; and in the absence of both, a President *pro tem.* may be elected by the meeting. The Secretary shall keep a record of all the proceedings of the Association, and conduct the correspondence of the Association.

ART. 5. The Treasurer shall keep an account of all funds of the Association. The Executive Council shall manage the affairs of the Association, subject to the constitution and by-laws.

ART. 6. A quorum for the transaction of business shall be twenty members.

ART. 7. No person shall be admitted to membership of this Association who is not a member of the bar of the Supreme Court, and who has not been engaged in the regular

practice of the law for one year next preceding his application for admission.

ART. 8. All applications for membership shall be referred to the Executive Council, who shall report the same to the Association, with their recommendation thereon; and no person shall be admitted to membership except by a two-thirds vote of the members present. Each member shall pay an admission fee of five dollars, and annual dues of three dollars.

ART. 9. The annual meetings of the Association shall be held in January of each year, at the capital, at such time as the Executive Council fix. Thirty days' notice of the annual meeting shall be given by the Secretary. Special meetings may be called by the Executive Council, of which meetings thirty days' notice shall be given to the members by the Secretary.

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## BY-LAWS.

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SECTION 1. The Executive Council shall, on or before the first day of May of each year, designate such a number of members, not exceeding six, to prepare and deliver or read at the next annual meeting thereafter appropriate addresses or papers upon subjects chosen and assigned by the Council to each of said members, as may be so selected for such purpose.

SEC. 2. The order of exercises at each annual meeting shall be as follows:

1. Opening address by the President.
2. Consideration of applications for membership.
3. Reports of Secretary and Treasurer.
4. Report of Executive Council.
5. Reports of standing committees.
6. Reports of special committees.
7. Delivering and reading of addresses and papers.
8. Miscellaneous business.
9. Election of officers and delegates to American Bar Association.

SEC. 3. There shall be chosen by ballot, at each annual

meeting, three members as delegates to American Bar Association for the ensuing year.

SEC. 4. All addresses delivered and papers read before the Association, the copy of which is furnished by the author, shall be lodged with the Secretary. The annual address of the President, the reports of committees, and all proceedings of the annual meeting, shall be printed; but no other address delivered or paper read shall be printed, except by order of the Executive Council.

SEC. 5. The terms of office of all officers elected at any annual meeting shall begin at the adjournment of such annual meeting, and end at the adjournment of the next annual meeting. And in case of any vacancy, the Executive Council shall appoint some member to fill the vacancy, who shall hold until his successor is elected.

SEC. 6. The Treasurer's accounts and reports shall be examined annually by the Executive Council before their presentation to the Association, and the Executive Council shall report the result of such examination of Treasurer's report and accounts to the Association at its annual meeting.

SEC. 7. The Executive Council shall cause to be printed such a number of copies of the proceedings of its annual meeting as it shall deem best, not exceeding one thousand copies, and shall distribute the same to members of the Association, and to such other persons, or associations, or societies, as they may deem prudent; and shall, with the proceedings of each annual meeting, print the roll of active and honorary members of the Association, and its constitution and by-laws.

SEC. 8. Every member of the Association shall pay to the Treasurer on or before the first day of May, of each year (after the year of his admission), annual dues of three dollars. All members who have not paid their annual dues on or before May 1 shall, within thirty days thereafter, be notified of this fact by the Treasurer and requested to forthwith comply with the requirements of this by-law.

SEC. 9. The Secretary shall keep a "general membership



roll" on which shall appear in alphabetical order the name of every member of the Association from its organization, with the date of his admission.

The Secretary shall also keep an "honorary membership roll" to be composed of those members who shall be specially designated for this honor, by resolution of the Association on the formal written recommendation of the Executive Council.

The Secretary shall also prepare on the first day of March in each year, the "roll of active members" of the Association for that year, which shall include only those who have paid to the Treasurer their Association dues for the preceding year and the new members by whom no dues are payable for that year.

SEC. 10. The Treasurer shall, twenty days before the first day of March in each year notify all active members in arrears for the dues of the preceding year, that the roll of active members for the year, to be printed in the Annual Report of the proceedings, will be made up on that date, and that their names must be omitted from that published roll of active members, unless their delinquent dues have been paid.

SEC. 11. Only the active and honorary members of the Association shall be entitled to participate in the proceedings of the Association, or to a seat at its annual banquet.

SEC. 12. On the general membership roll opposite each name omitted from the active membership roll, shall be noted the reason for such omission—whether death, non-payment of dues, or personal request.

SEC. 13. Any member whose name has been omitted from the active membership roll for non-payment of dues, may have his name restored to such roll by the payment of the years' dues for which he is in arrears.

SEC. 14. The standing committees of the Association shall consist of the following:

Judiciary Committee—Five members.

Committee on Amendment of Laws—Five members.

Memorial Committee—Three members.

Committee on Legal Education and University Law School—Five members.

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**PUBLISHED ROLL OF MEMBERS.**

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**Honorary Members.**

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NAME AND ADDRESS.

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Hon. David J. Brewer.....	Washington, D. C.
Hon. Henry Wade Rogers.....	Chicago
Hon. Seymour D. Thompson.....	St. Louis
Hon. John W. Henry.....	Kansas City, Mo.
Hon. Nathaniel M. Hubbard.....	Iowa
Hon. P. S. Grosscup.....	Chicago
Hon. Samuel A. Kingman.....	Topeka
Hon. Thomas Ewing, Jr.*.....	New York City
Hon. L. D. Bailey*.....	Lawrence, Kan.

\*Deceased.

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**Active Members.**

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NAME AND ADDRESS.

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Alden, H. L.....	Kansas City, Kan.
Allen, S. H.....	Topeka
Benson, A. W.....	Ottawa
Benton, C. E.....	Fort Scott
Bergen, A.....	Topeka
Berger, A. L.....	Kansas City, Kan.
Bird, W. A. S.....	Topeka
Bond, T. L.....	Salina
Bone, H. J.....	Ashland
Bowman, C. S.....	Newton
Boyle, L. C.....	Kansas City, Mo.
Bucher, Charles.....	Newton
Burris, John T.....	Olathe
Calderhead, W. A.....	Marysville
Campbell, M. T.....	Topeka
Clark, George W.....	Topeka
Clarke, W. B.....	Kansas City, Mo.
Cliggett, Morris.....	Pittsburg
Coleman, C. C.....	Clay Center
Cowles, W. H.....	Topeka
Cunningham, E. W.....	Emporia
Curtis, C. H.....	Burlingame

## ACTIVE MEMBERS—CONTINUED.

## NAME AND ADDRESS.

Dana, A. W.	Topeka
Dassler, C. F. W.	Leavenworth
Dewey, T. E.	Abilene
Dillard, W. P.	Fort Scott
Doster, Frank	Topeka
Downey, Francis E.	Topeka
Egan, J. G.	Chicago
Elliott, C. E.	Wellington
Ellis, A. H.	Beloit
Fenlon, Thomas P.	Leavenworth
Ferry, L. S.	Topeka
Foster, F. H.	Topeka
Freeman, Winfield	Kansas City, Kan.
Frith, J. Harvey	Emporia
Garver, T. F.	Topeka
Getty, George	Syracuse
Gleed, C. S.	Topeka
Gleed, J. W.	Topeka
Godard, A. A.	Topeka
Graves, Chas. B.	Emporia
Green, J. W.	Lawrence
Grattan, G. F.	McPherson
Guthrie W. F.	Atchison
Hagan, Eugene	Topeka
Hamilton, Clad	Topeka
Harrison, T. W.	Topeka
Hayden, Charles	Holton
Hayden, Sydney	Holton
Heizer, R. C.	Osage City
Herrick, J. T.	Wellington
Hessin, John E.	Manhattan
Hick, R. S.	Westmoreland
Hobbs, Bruno	Cripple Creek, Col.
Holt, W. G.	Kansas City, Kan.
Hopkins, Scott	Horton
Horton, Albert H.	Topeka
Huron, G. A.	Topeka
Hurd, A. A.	Topeka
Hazen, Z. T.	Topeka
Harvey, A. M.	Topeka

## ACTIVE MEMBERS—CONTINUED.

NAME AND ADDRESS.	
Herrick, R. T.	Topeka
Jackson, H. M.	Atchison
Jetmore, A. B.	Topeka
Johnson, W. A.	Garnett
Johnson, J. G.	Garnett
Johnson, Frank O.	McPherson
Johnson, W. A.	Topeka
Jones, Howel	Topeka
Kelso, David	Leavenworth
Kimball, C. H.	Parsons
Kimble, Sam	Manhattan
Kenna, E. D.	Chicago
Larimer, J. B.	Topeka
Lewis, C. A.	Phillipsburg
Littlefield, W.	Topeka
Lloyd, Ira E.	Ellsworth
Loomis, N. H.	Topeka
Martin, David	Atchison
Martin, F. L.	Hutchinson
Martin, John	Topeka
McClure, J. R.	Junction City
McFarland, E. A.	Lincoln
McFarland, J. D.	Topeka
Milton, B. F.	Dodge City
Moore, O. L.	Abilene
Miller, O. L.	Kansas City
Milliken, J. D.	McPherson
Monroe, Lee	Hays City
Moore, McCabe	Kansas City, Kan.
Morris, R. E.	Kansas City, Kan.
Mulvane, David W.	Topeka
McBride, W. H.	Independence
Overmyer, David	Topeka
Osborn, S. J.	Salina
Parker, J. W.	Olathe
Peck, George R.	Chicago
Perkins, L. H.	Lawrence
Perry, Albert	Troy
Pickering, I. O.	Olathe
Porter, Silas W.	Kansas City, Kan.

## ACTIVE MEMBERS—CONTINUED.

## NAME AND ADDRESS.

Postlethwaite, John C.	Jewell City
Pringle, J. Y.	Burlingame
Quinton, E. S.	Topeka
Redden, A. L.	Topeka
Riggs, S. A.	Lawrence
Roark, William S.	Junction City
Roberts, John W.	Hutchinson
Rossington, W. H.	Topeka
Root, H. C.	Topeka
Ryan, Thomas.	Washington, D. C.
Sedgwick, T. N.	Parsons
Simms, John S.	Dighton
Slonecker, J. G.	Topeka
Sluss, H. C.	Wichita
Smith, Charles Blood.	Topeka
Smith, Wm R.	Topeka
Smith, C. W.	Stockton
Spencer, Chas. F.	Topeka
Stackpole, Hy. W.	Clay Center
Stillwell, L.	Erie
Summerfield, M.	Lawrence
Switzer, J. F.	Topeka
Thomson, Wm.	Burlingame
Turner, R. W.	Mankato
Valentine, D. M.	Topeka
Valentine, H. E.	Topeka
Vance, A. H.	Topeka
Vernon, W. H.	Larned
Waggener, B. P.	Atchison
Wall, T. B.	Wichita
Ware, E. F.	Topeka
Watkins, Albert.	Topeka
Welch, R. B.	Topeka
Wells, Frank.	Seneca
Wells, Abijah.	Seneca
Wheeler, Bennett R.	Topeka
White, T. J.	Kansas City
Whiteside, H.	Hutchinson
Williams, F. L.	Clay Center
Wood, O. J.	Topeka



## Mortuary Roll.

NAME AND DATE OF DEATH.

Bailey, L. D.	Oct. 15, 1891
Campbell, A. B.	Dec. 20, 1897
Crozier, Robert	—1895
Douthitt, Wm. P.	Nov. 28, 1897
Everest, A. S.	Oct. 22, 1894
Ewing, Thos. Jr.,	Jan. 21, 1896
Foster, C. G.	June 21, 1899
Green, H. T.	
Griffin, Charles T.	
Greer, John P.	Nov. 28, 1889
Gillett, Almerin	
Hamble, C. B.	
Harris, Amos.	Feb. 2, 1891
Holt, Joel.	April 27, 1892
Humphrey, H. J.	Aug. 8, 1890
Hurd, T. A.	Feb. 22, 1899
Hallowell, J. R.	June 24, 1898
Johns, H. C.	
Johnson, J. B.	May 18, 1899
Lewis, Ellis	Aug. 12, 1897
Maltby, J. C.	April 27, 1898
McMath, E. A.	Aug. 29, 1898
Prescott, J. H.	July 5, 1891
Ritter, John N.	Feb. 8, 1896
Robinson, R. G.	April 18, 1898
Randolph, A. M. F.	Sept. 1, 18 8
Scott, W. W.	May 31, 1890
Stillings, E.	Feb. 8, 1890
Stephens, N. T.	
Spilman, R. B.	Oct. 19, 1898
Thacher, S. O.	Aug. 11, 1895
Usher, John P.	April 13, 1889
Wagstaff, W. R.	
Webb, Leland J.	
Wolfe, Eugene.	
Webb, W. C.	April 19, 1898









**Proceedings of the  
Bar Association of the  
State of Kansas.**



**Eighteenth Annual Meeting.  
1901.**



**EIGHTEENTH ANNUAL MEETING**

**OF THE**

**BAR ASSOCIATION**

**OF THE**

**STATE OF KANSAS.**

---

**HELD IN THE CITY OF TOPEKA,  
JANUARY 31 AND FEBRUARY 1, 1901.**

---

**PRESS OF THE TIMES,  
CLAY CENTER.  
1901.**



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**OFFICERS FOR THE YEAR 1901.**


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PRESIDENT.....	SILAS PORTER
VICE-PRESIDENT.....	B. F. MILTON
SECRETARY.....	D. A. VALENTINE
TREASURER.....	HOWEL JONES

---

**Executive Council.**J. G. SLONECKER, *Chairman.*

C. W. SMITH,

F. DUMONT SMITH,

H. F. MASON,

C. B. GRAVES.

**Delegates to American Bar Association.**

B. P. WAGGENER,

W. H. ROSSINGTON,

H. WHITESIDE.

**Alternates.**

L. H. PERKINS,

H. C. SLUSS,

H. P. FARRELLY.

**Judiciary Committee.**T. N. SEDGWICK, *Chairman.*

A. L. BERGER,

JOHN J. JONES,

W. S. ALLEN,

ANSEL R. CLARK.

**Amendments to Laws.**G. F. GRATTAN, *Chairman.*

D. W. MULVANE,

J. C. POLLOCK,

J. W. DAVIS,

C. E. BRANINE.

**Legal Education and University Law School.**JOHN F. SWITZER, *Chairman.*

H. WHITESIDE,

A. H. ELLIS,

W. P. DILLARD,

W. W. HOOPER.

**Memorial Committee.**CHARLES BLOOD SMITH, *Chairman.*

O. G. ECKSTEIN,

J. H. GILLPATRICK.

**Membership Committee.**GEORGE W. CLARK, *Chairman.*

T. E. DEWEY,

W. H. VERNON, JR.

## OFFICERS OF PREVIOUS YEARS.

1883-4.

**Officers.**

*President*.....ALBERT H. HORTON  
*Vice-President*.....N. T. STEPHENS  
*Secretary*.....W. H. ROSSINGTON  
*Treasurer*.....D. M. VALENTINE

**Executive Council.**

D. M. Valentine, Chair.  
 James Humphrey.  
 David Martin.  
 J. H. Gillpatrick.  
 Frank Doster.

1885.

**Officers.**

*President*.....ALBERT H. HORTON  
*Vice-President*.....W. A. JOHNSTON  
*Secretary*.....W. H. ROSSINGTON  
*Treasurer*.....D. M. VALENTINE

**Executive Council.**

D. M. Valentine, Chair.  
 James Humphrey.  
 David Martin.  
 E. S. Torrance.  
 L. Houk.

1886.

**Officers.**

*President*.....ALBERT H. HORTON  
*Vice-President*.....E. S. TORRANCE  
*Secretary*.....JOHN W. DAY  
*Treasurer*.....D. M. VALENTINE

**Executive Council.**

W. A. Johnston, Chair.  
 John Guthrie.  
 A. W. Benson.  
 M. B. Nicholson.  
 John H. Mahan.

1887.

**Officers.**

*President*.....SOLON O. THACHER  
*Vice-President*.....HENRY C. SLUSS  
*Secretary*.....JOHN W. DAY  
*Treasurer*.....D. M. VALENTINE

**Executive Council.**

W. A. Johnston, Chair.  
 C. B. Graves.  
 Robert Crozier.  
 George S. Green.  
 T. F. Garver.



## 1888.

**Officers.**

*President*.....W. A. JOHNSTON  
*Vice-President*.....EUGENE F. WARE  
*Secretary*.....JOHN W. DAY  
*Treasurer*.....D. M. VALENTINE

**Executive Council.**

John Guthrie, Chair.  
 S. B. Bradford.  
 George J. Barker.  
 J. W. Ady.  
 J. H. Mahan.

## 1889.

**Officers.**

*President*.....JOHN GUTHRIE  
*Vice-President*.....T. F. GARVER  
*Secretary*.....CHAS. S. GLEED  
*Treasurer*.....D. M. VALENTINE

**Executive Council.**

B. F. Simpson, Chair.  
 W. W. Scott.  
 L. B. Kellogg.  
 A. W. Benson.  
 Chas. S. Hayden.

## 1890.

**Officers.**

*President*.....ROBERT OROZIER  
*Vice-President*.....CHAS. B. GRAVES  
*Secretary*.....C. J. BROWN  
*Treasurer*.....HOWEL JONES

**Executive Council.**

B. F. Simpson, Chair.  
 John Guthrie.  
 Case Broderick.  
 W. W. Scott.  
 B. M. Eaton.

## 1891.

**Officers.**

*President*.....D. M. VALENTINE  
*Vice-President*.....L. HOUK  
*Secretary*.....C. J. BROWN  
*Treasurer*.....HOWEL JONES

**Executive Council.**

T. F. Garver, Chair.  
 E. W. Cunningham.  
 M. B. Nicholson.  
 J. R. McClure.  
 W. P. Douthitt.

## 1892.

**Officers.**

*President*.....T. F. GARVER  
*Vice-President*.....J. W. GREEN  
*Secretary*.....C. J. BROWN  
*Treasurer*.....HOWEL JONES

**Executive Council.**

W. C. Webb, Chair.  
 C. Angevine.  
 E. W. Moore.  
 Winfield Freeman.  
 A. A. Harris.

1893.<sub>三</sub>**Officers.**

*President*.....JAMES HUMPHREY  
*Vice-President*.....H. L. ALDEN  
*Secretary*.....C. J. BROWN  
*Treasurer*.....HOWEL JONES

**Executive Council.**

J. D. Milliken, Chair.  
 N. H. Loomis.  
 A. H. Ellis.  
 Sam Kimble.  
 H. W. Gleason.

1894.

**Officers.**

*President*.....J. D. MILLIKEN  
*Vice-President*.....F. L. MARTIN  
*Secretary*.....C. J. BROWN  
*Treasurer*.....HOWEL JONES

**Executive Council.**

H. L. Alden, Chair.  
 Sam Kimble.  
 J. W. Green.  
 T. L. Bond.  
 E. W. Moore.

1895.

**Officers.**

*President*.....H. L. ALDEN  
*Vice-President*.....J. B. LARIMER  
*Secretary*.....C. J. BROWN  
*Treasurer*.....HOWEL JONES

**Executive Council.**

Sam Kimble, Chair.  
 T. B. Wall.  
 A. A. Godard.  
 E. A. McFarland.  
 J. D. McCleverty.

1896.

**Officers.**

*President*.....DAVID MARTIN  
*Vice-President*.....WM. THOMSON  
*Secretary*.....C. J. BROWN  
*Treasurer*.....HOWEL JONES

**Executive Council,**

A. A. Godard, Chair.  
 T. B. Wall.  
 W. B. Smith.  
 M. B. Nicholson.  
 John W. Day.

1897.

**Officers.**

*President*.....WM. THOMSON  
*Vice-President*.....S. H. ALLEN  
*Secretary*.....C. J. BROWN  
*Treasurer*.....A. A. GODARD

**Executive Council.**

O. O. Coleman, Chair.  
 John W. Roberts.  
 Lee Monroe.  
 McCabe Moore.  
 C. B. Graves.

## 1898.

**Officers.**

<i>President</i> .....	S. H. ALLEN
<i>Vice-President</i> .....	C. C. COLEMAN
<i>Secretary</i> .....	C. J. BROWN
<i>Treasurer</i> .....	A. A. GODARD

**Executive Council.**

C. B. Graves, Chair.
J. D. McFarland.
Lee Monroe.
L. C. Boyle.
McCabe Moore.

## 1899.

**Officers.**

<i>President</i> .....	C. C. COLEMAN
<i>Vice-President</i> .....	SAM KIMBLE
<i>Secretary</i> .....	C. J. BROWN
<i>Treasurer</i> .....	HOWEL JONES

**Executive Council.**

Silas Porter, Chair.
J. C. Postlethwaite.
E. W. Cunningham.
J. T. Pringle.
J. W. Parker.

## 1900.

**Officers.**

<i>President</i> .....	SAM KIMBLE
<i>Vice-President</i> .....	SILAS PORTER
<i>Secretary</i> .....	D. A. VALENTINE
<i>Treasurer</i> .....	HOWEL JONES

**Executive Council.**

B. F. Milton, Chair.
J. G. Slonecker.
Sidney Hayden.
W. E. Saum.
John T. Burris.



**MINUTES**  
**OF THE**  
**EIGHTEENTH ANNUAL MEETING.**

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*Topeka, Kan., January 31, 1901.*

The Eighteenth Annual meeting of the Bar Association of the State of Kansas was called to order at 10:30 o'clock a. m. in the Supreme Court room, President Sam Kimble in the chair.

The reading of the minutes of the last meeting was dispensed with.

Upon taking the chair the president said:

"Since the organization of this Association, the first forenoon's meeting has usually been of an informal character. There is, however, always some business necessary to be attended to. We would like to have all the members understand as far as possible the general details of the program. The meetings occupy two days and a feast. All members of the State Bar Association should understand at the outset that the banquet given each year by the Association is for the membership and that all are invited to participate. I say this now because so many have spoken to me about their right to attend the banquet.

"It is expected that the various committees have already prepared their respective reports; and if they have not done so, that they will hasten their duty in that respect, and try to prepare suitable reports on the matters in their hands, and, wherever practicable, in writing.

"A good program has been prepared by the executive council. The business of the meetings is subject largely to your wishes.

"I find on the program that the report of the executive council is first, and I call for the report of that committee from Mr. Milton."

Mr. Milton, as chairman of the committee, made report as follows:

#### REPORT OF EXECUTIVE COUNCIL.

The Executive Council would report that the applications of the following named attorneys for membership of the Bar Association have been received, examined and approved, and such applicants are hereby recommended for election as members, as follows, to wit:

<i>W. W. Hooper, Leavenworth.</i>	<i>W. S. Allen, Newton.</i>
<i>J. C. Pollock, Winfield.</i>	<i>W. H. Vernon Jr., Larned.</i>
<i>T. F. Rager, Erie.</i>	<i>Horry C. Bowman, Newton.</i>
<i>Geo. H. Whitcomb, Topeka.</i>	<i>C. E. Branine, Newton.</i>
<i>Jas. H. Reeder, Hays.</i>	<i>E. W. Myler, Burlingame.</i>
<i>David Rathbone, Hays.</i>	<i>Emera A. Wilson, Belle Plaine.</i>
<i>John J. Jones, Chanute.</i>	<i>C. E. Freeman, Topeka.</i>
<i>Alvin R. Springer, Manhattan.</i>	<i>H. G. Price, Burlingame.</i>
<i>J. K. Coddington, Westmoreland.</i>	<i>E. H. Madison, Dodge City.</i>
<i>Ezra Branine, Newton.</i>	<i>Compton Moore, Paola.</i>
<i>Rezin Iams, Clay Center.</i>	<i>J. H. Staveley, Lyndon.</i>
<i>O. G. Eckstein, Wichita.</i>	<i>H. C. Dooley, Coffeyville.</i>
<i>A. L. Greene, Newton.</i>	<i>Harry Brice, Cimarron.</i>
<i>R. A. Burch, Salina.</i>	<i>C. A. Smart, Ottawa.</i>
<i>Arthur M. Jackson, Leavenworth.</i>	<i>Ansel R. Clark, Sterling.</i>
<i>H. Ward Page, Topeka.</i>	<i>Geo. E. McMahon, Anthony.</i>
<i>F. Dumont Smith, Kinsley.</i>	<i>Altes H. Campbell, Iola.</i>
<i>John F. Hanson, Lindsborg.</i>	<i>D. H. Martin, Topeka.</i>

Respectfully submitted,

B. F. MILTON, Chairman.

By President Kimble: Gentlemen of the Association, you have heard the report, what is your pleasure in regard to it?

By Mr. Slonecker: I move the report be approved and the gentlemen mentioned therein be elected members of the Association. The motion was seconded and carried unanimously.

By President Kimble: The next matter on the program is the report of the Memorial Committee. Mr. Postlethwaite, the chairman of this committee, I have not seen. Has any gentleman present any knowledge of the report of the committee?

On the suggestion of Mr. Slonecker the report of the Memorial Committee was passed till later in the session.

By President Kimble: We are now properly under the head of Miscellaneous Business, and if any member of the Association has anything to suggest in "a miscellaneous way", we will now take it up.

By Mr. J. T. Herrick: On the nomination of officers for the ensuing year, it has been suggested that the appointments be made at this time. I move the appointment by the President of a committee of five on Nomination of Officers for the ensuing year. The motion was carried unanimously.

By President Kimble: I will, if you please, take a little time to select this committee; and will, at the afternoon session, report the names of the members of the committee.

By the President: Mr. Secretary, have you any special report to make in the matter of printing the Proceedings of the Bar Association's last session?

By Mr. Valentine, Secretary: No special report save to apologize in a way. It was impossible until quite recently to get the paper that was read by Mr. Dean at the last meeting, but I finally secured it and now have a hundred copies of the printed Proceedings in my office. It was rushed just as rapidly as possible after I got a copy of the speech mentioned. To prepare and print the report without it, the Executive Committee thought, would be like the play of Hamlet with Hamlet

left out. The Proceedings will be sent out by mail within a few days after this meeting. The Secretary would further recommend that the Proceedings be brought out early, within two months after the adjournment of the Association. It has been late heretofore, very late, but interest in the Proceedings closely follows the meeting, and I think it would be better to crowd the printing, hereafter.

By President Kimble: I understand from this that you can get a copy of the Proceedings for 1900 by applying to the Secretary. I presume copies will be sent to all the members.

By Mr. Slonecker: I suppose this is the proper time for the report of the Treasurer, but Mr. Jones has been very suddenly called away. He did not have a prepared report and left the matters in my hands. I can only report that the amount of money now on hands is about \$160; but the printed Proceedings of the last session have not been paid for, and some other bills are unpaid, which will more than exhaust that amount. I speak of it as it was about the first of January, and it does not include fees for the admission of new members and dues paid in the last few days, which will probably bring it up to about \$200, possibly more. Some of the members of this Association have not paid their dues for 1900, and some have not paid for a longer time. I would suggest that they pay for not only 1900 but also for 1901—last year and this year, too.

By President Kimble: It is beyond doubt that a considerable number of the members through pure neglect have failed to send in their dues. If the members will be kind enough to notify each other to pay up, by this means, I presume, it will relieve the Executive Council a good deal.

By Mr. Waggener: Mr. President, do you not think it would be practicable to make an assessment of \$10 on all the members? (Cries of "Yes, yes".)

By Mr. Garver: I think it would be better to make it \$5.



By Mr. Waggener: Well, then, I move that an assessment of \$5 be made on all members of the Association.

By Mr. Garver: I move to amend the motion so that it will be an invitation to the members to pay \$5 each, instead of an assessment on them.

By Mr. Waggener: I accept the amendment. The motion as amended was carried unanimously.

By Mr. Slonecker: There is a committee, perhaps a standing committee, on raising the standard for admission to the bar. No specific time was fixed for that committee to make report. I, therefore, move the report of that committee be heard at the afternoon session. I understood from the remarks of the Chief Justice, this morning, that the chairman of that committee, Mr. Cunningham, is not in the city, but that the other members of the committee are. I also understand a bill is now before either the Senate or the House bearing on this subject and I would suggest that the committee get a copy of that bill.

By Mr. Perkins: I presume that the chief wording of the report of that committee has fallen upon me. We will get together further on. I will simply state now, while on my feet, that the matter in the rough is like this. This committee at the last session was appointed to prepare a bill and bring it before a meeting of this Association at this session. For some reason or other we did not get together, and some time before the meeting of the legislature Justice Cunningham wrote to me, and we had a letter or two back and forth. It resulted in him asking me to prepare a draft of a bill, and I turned it over to Judge Green to know what he had done. It appears that he had forgotten a committee had been appointed and had himself prepared a bill. Justice Cunningham, Mr. McFarland and myself had gathered up the laws of other states, and we have them, I have some of them now in my pockets. I devoted a good deal of time to the draft, and forwarded it around to the other members of this committee, and

they made their suggestions. We have the matter now in what we consider a first-class bill. The Dean admits it is a great improvement on his. It is arranged so that we will get the representative of Douglas county to substitute our bill for the one already introduced, and we will get our bill on the calendar. If the Bar Association now, or at any time, wishes an extended report we will be prepared to give it. We are also prepared for getting it introduced in as favorable position as it would have had otherwise.

By Mr. Slonecker: I move that this matter be passed until tomorrow afternoon.

By Mr. Garver: Would it not be better to pass it indefinitely? My idea would be to take these things up whenever we have time.

By President Kimble: The motion will be framed and put so as to state that the report of this committee be passed at this time subject to being called for at any convenient time.

By Mr. Garver: I understand there are a number of bills pending in the legislature which may be of interest to lawyers. I think it would be a good idea to get copies of all these bills, and sanction the good things therein, and, if we find anything therein not good, to oppose the same. I desire to offer a resolution. I will mention it now. It is not in writing. It will be taken up at some future time. It is, that it is the sense of this Association that Chapter 106 of the laws of 1897 be repealed. I will prepare and put the resolution in writing. Under it in ordinary cases and in all sorts of cases the hands of the court are tied. The court cannot do anything, and I think it ought to be wiped out.

By Unknown: I am very much in favor of these suggestions. I believe one of the primary objects for which this Association was formed was to have a talk from time to time on all amendments before they became laws. The first suggestion I understood to be to get copies of the bills which

change or propose to change the methods of practice. I think that ought to be done.

By President Kimble: The Chairman understands that Judge Garver will, at an early time, offer a resolution in writing. It ought to be referred to the Committee on Laws. I appointed a Committee on Judiciary and on Amendments to Laws. I thought their duties were so much in line that they should act together as much as possible. I think they should give the matter close attention. I presume we shall hear from Mr. Williams, of Clay Center, and Mr. Overmyer, of Topeka. I think it would be well to call the attention of the committees to this subject, All will take notice of the fact that Judge Garver has presented a proposition, which will be presented in the form of a resolution, so that it will be clearly a matter of record so that all may know. We shall expect this committee to look after it.

By Mr. Slonecker: I move that the Committee on Amendments to Laws be directed to make report to this Association on legislation now pending which affects pleading and practice.

By Mr. Porter: I see there is no special time for the report of the Committee on Amendments to Laws, and I second the motion.

By President Kimble: It has been moved and seconded that the Committee on Amendments to Laws be requested to make a report pertaining to all matters of legislation now pending before the legislature that are of interest to this Association, and that such committee report as early as possible.

By Secretary Valentine: Mr. Williams told me just a few minutes since, that he had received a telegram and that it would be necessary for him to go back home at 1 o'clock.

By President Kimble: Mr. Milliken is here.

The motion was carried.

By Mr. Dewey: If Mr. Mason (Chairman House Committee on Judiciary) and Mr. Smith (Chairman Senate Com-

mittee on Judiciary) were to come before this Association and give us a general idea of matters, they could in fifteen minutes tell us more than the committee can otherwise find out in a long time. I therefore move that this Association ask Mr. Smith and Mr. Mason to appear before the Bar Association for that purpose. Mr. Mason is on the committee.

By Mr. Porter: I second the motion.

By President Kimble: I extended to the President of the Senate, the Speaker of the House and the members of both branches of the legislature an invitation to be present at our Bar Association meetings as far as possible. There is a motion before you to invite Senator Smith and Representative Mason to appear before this body at some time tomorrow and make a statement of such legislation as they know to be pending before the Legislature. The motion was unanimously carried.

By Mr. F. L. Martin: I would like to call attention to the fact that the evening session has been set apart for the celebration of John Marshall day. I move that the President of the Association be authorized to ask each branch of the Legislature to attend this meeting.

By President Kimble: I will state that in my invitation to the Legislature I made special mention of this memorial service.

The program indicates that the afternoon session begins at 2 o'clock. To me it means 2 o'clock; and I would say to any who have any interest in my annual address that they should be here at that hour. I desire to say that the program is to be carried out to the letter. I trust you all understand that the session this afternoon will go on time. So far as the matters I have to say are concerned, the show must go on whether you be here or not.

By Mr. Stonecker: I move the Association take a recess till 2 o'clock. The motion was seconded and carried.

## AFTERNOON SESSION, 2 O'CLOCK.

By President Kimble: The Committee on Nominations will consist of J. T. Herrick, of Wellington; G. H. Lamb, of Yates Center; T. E. Dewey, of Abilene; Frank Wells, of Seneca, and W. H. Vernon, of Larned.

The President then delivered his annual address which will be found in its proper place following these minutes.

After which Eugene Hagan, of Topeka, chairman of the Committee on Legal Education and State University Law School, made report as follows:

REPORT OF COMMITTEE ON LEGAL EDUCATION  
AND STATE UNIVERSITY LAW SCHOOL.

*To the President and Gentlemen of the Kansas State Bar Association:*

Your Committee on Legal Education and State University Law School, begs leave to report as follows:

Your committee is gratified to report that the conditions at our Law School are exceedingly favorable, and that the course of legal education is being advanced in commendable ways by that Institution. In considering the needs of legal education in this State, and its relation to our State Law School, your committee has reached the following conclusions:

First. It is with special gratification that we note that the law course has been extended from two to three years, and that the standard of educational requirements for admission to the Law School has been materially increased; the requirements for the Law School being equal now to the requirements for entrance to the School of Arts in the University.

Second. Your committee is also gratified to learn that the additional year in the law course and also the increased educational requirements for admission, have not, as was feared by some, resulted in a decrease of attendance at the Law School.

Third. We notice that while the regents of the University have added this year to the law course, they have not increased

introducing to you our next speaker, who will address you on "The Early Days of Marshall"—John D. Milliken, of McPherson.

The address will be found in its proper place following these minutes.

By F. L. Martin, Chairman: The next subject on the program is, "Marshall, the Diplomat," by F. L. Williams, of Clay Center. Mr. Williams was called away this morning by telegram and, therefore, that paper will be omitted. The next subject on the program is, "Marshall as the Expounder of the Constitution," by E. W. Cunningham, of Emporia, whom I now have the honor of presenting to you.

The address will be found in its proper place following these minutes.

By President Kimble: The meeting for tomorrow morning is set for 9 o'clock, when the remainder of the program will be completed. Tomorrow evening the members will be entertained at the banquet at the Hotel Throop.

SECOND DAY.

*9:30 A. M., February 1, 1901.*

By President Kimble: The first thing on the program this morning is an address on "The Common Law in Kansas," by J. D. McFarland, of Topeka, whom I now have the honor of presenting to you.

The address will be found in its proper place following these minutes.

By President Kimble: The next on the program is an address on "Divorce," by N. L. Bowman, of Garnett, which, owing to the temporary absence of Mr. Bowman, will for the present be passed, and we will listen to the next address on the program; subject, "Unanimity Verdicts," by Frank Wells, of Seneca, whom I now introduce to you; Mr. Wells.

The address will be found in its proper place following these minutes.

By President Kimble: We will now listen to the address of N. L. Bowman, of Garnett, subject, "Divorce." I take pleasure in presenting to you Mr. Bowman.

The address will be found in its proper place following these minutes.

By John D. Milliken: Your Committee on Amendments to Laws, reports in writing as follows:

"We, your Committee on Legislation, have examined House Bill No. 72 now pending in the legislature, and think this bill

Mr. H. F. Mason, of Garden City, followed Mr. Perkins on the same subject with an address which will also be found in its proper place.

The reading of the above papers was followed by interesting discussions, which were participated in by various members of the Association.

By President Kimble: Miscellaneous Business is next in order. Has any member anything to bring before the Association under this head?

By Mr. Garver: I now offer the following resolution:

*Resolved*, That it is the sense of the State Bar Association that Chapter 106, Laws 1897, providing for trial by jury in contempt cases, should be repealed, as an unwarranted interference with the powers of the courts, and not in the interest of an efficient administration of the law.

I move its adoption.

A discussion of the merits of the resolution was indulged in by Mr. Garver, Mr. Kimble and Mr. Welch, after which the motion was seconded and carried.

By R. B. Welch: I move that a committee of three, of which Judge Garver shall be one, be delegated to present this matter to the committees of the House and Senate. The motion was seconded and carried.

By President Kimble: The Chair will appoint on this committee, Judge Garver, R. B. Welch and John D. Milliken.

Senator Smith, Chairman of the Senate Committee on Judiciary, appeared before the Association and stated the character of the legislation pending before his committee.

Representative Mason, Chairman of the House Committee on Judiciary, also made a similar statement of the legislation now pending before his committee, and said the printed copies of it would be presented to this body.

A motion that this Association now adjourn until 8 o'clock this evening was carried.



## EVENING SESSION.

*8 o'clock, January 31, 1901.*

By President Kimble: Members of the Bar Association, ladies and gentlemen, the hour for the special order of exercises of this Association has arrived. One hundred years ago on the fourth day of February, coming, a man—John Marshall—assumed the judicial ermine in the greatest court in the land; a man whose life and work is cherished by the legal profession everywhere. The American Bar Association has seen fit to call attention to this important event, and to suggest that it be properly commemorated throughout the United States; and, in accordance with the suggestion, the Kansas State Bar Association has arranged as far as possible to hold proper memorial exercises, and, in accordance therewith, the committee has arranged a program for this evening. I beg to call the Chairman of the committee, Hon. F. L. Martin, to assume the gavel at this time, and supervise the proceedings of this meeting. I present to you Judge F. L. Martin, who will superintend the present order.

By F. L. Martin: The day set apart for the celebration as memorial day in honor of John Marshall is February 4, 1901, that being the centennial of the day he took the oath of office as chief justice of the United States. January 1st was the day on which he was appointed by President Adams. The committee and the Executive Council concluded that it would be impossible to get the members of the Bar of the State here again on February 4th, and hence, it was agreed to hold these services this evening. Ladies and gentlemen, I now have the honor of introducing to you the first speaker of the evening, Judge H. C. Sluss, of Wichita, who will now address you, subject, "John Marshall."

The address will be found in its proper place following these minutes.

By F. L. Martin, Chairman: I now take great pleasure in

the teaching force commensurate therewith, and that the work put upon the faculty of the school is more than should be required of them. While it may not be the province of this committee to recommend action on the part of the Board of Regents, it is certainly the judgment of this committee, that at least one additional instructor should be added to the faculty of the Law School.

Fourth. In connection with the general question of legal education, your committee is pleased to report that a bill will be presented in the present session of the Legislature calling for an increased standard of preparation for admission to the bar, following the example laid down by the State Law School, providing for a course of three years, and also requiring a higher educational standard of the student before he is permitted to begin the study of law.

Your committee earnestly approves the terms of the proposed bill, and would urge that the Bar Association, and each member thereof, take an interest in securing its passage.

Fifth. Your committee would further report that upon investigation they find that the quarters furnished the Law School are entirely inadequate, and that the regents are unable to give the Law School additional room, such as its necessities require, and your committee would recommend that the Bar Association call the attention of the Governor and the Legislature to this fact, and that they be requested to give the Law School an independent building at an early date; that while it may not be expedient to ask for this building of the present Legislature, we earnestly recommend that the committee on Legal Education and State University Law School, to be appointed at this session of this Association, call upon the Governor and lay the matter before him with a view of having him present it to the Legislature at the next session.

Sixth. In connection with the needs of a separate Law building, there is another matter to which your committee would call the attention of the Association, and that is, the

necessity of an immediate increase in the library of the Law School. Although the present library is serviceable in many ways as a working library, yet there is needed the addition of many reports and of general legal literature to make the school's law library worthy of comparison with the libraries of the other law schools of our country. Your committee would recommend that this Association earnestly use its influence to secure an immediate appropriation sufficient to cover these present needs.

Respectfully submitted,

EUGENE HAGAN.

J. W. GREEN.

W. S. ROARK.

ED. C. LITTLE.

FRANK WELLS.

By Mr. R. B. Welch: I move the adoption of the report. The motion was seconded and carried.

By President Kimble: Several years ago the custom was adopted of trying to bring the State University Law School as near to the State Bar Association as possible, and the State Bar Association as near to the State University Law School as possible. It has proven much more satisfactory than the suggester anticipated. The practice has been for members of the graduating classes of the Law School to prepare papers in competition, and the one whose paper was found to be most properly prepared was to be honored by its delivery before this Association. The subject of the thesis this year is, "The Doctrine of Locus Poenitentia as applied to Contracts". It affords me great pleasure to introduce to you its author, Mr. Peyton Carter, of Chapman, who will now be asked to deliver the same.

Mr. Carter's address will be found in its proper place following these minutes.

Mr. L. H. Perkins, of Lawrence, delivered an address on "Corporal Punishment for Crime," which address will be found in its proper place in these Proceedings.

should become a law. We have suggested some slight amendments to the first section in relation to the excepted cases and leaving out the requirement of the certificate of the trial judge.

"We also recommend the passage of the bill of Representative McKeever allowing the service of a case-made by filing with the clerk of the trial court.

"Your committee does not feel warranted at the present time in recommending the passage of the bill now pending in the legislature for a change of venue in criminal cases. This is a radical change. It would probably be unconstitutional. If a new definition is to be given of the old expression 'vicinage' from which a jury is to be drawn, it should be done only after the fullest and most careful discussion. It should never be done under such circumstances as to suggest that it was brought about to meet any existing case.

"On the matter of verdicts in civil cases your committee is of the opinion that the time has come when a verdict should be rendered in district and justices' courts by three-fourths of the number constituting the jury. Every lawyer has known of many instances where one or two jurors have prevented a verdict. Occasionally this may be in the interest of justice. But we are constrained to say that we believe such is not often the case. And the suspicion is sometimes entertained that such failure to give a unanimous verdict is for reasons other than a conscientious desire to arrive at a fair verdict.

"Your committee is deeply interested in the question of revision of our statutes. It has been many years since this work has been done to the satisfaction of the Bar of the State. The writing of the laws upon tablets out of the reach of the average person, as well as of some lawyers, is not to be approved.

"We do not believe, however, that this important work should be done by one man. The responsibility for such undertaking is too great for any one person. It should be

done by a board of three lawyers to be selected by the Supreme Court. Their work should then be approved by a majority of the judges of the Supreme Court.

Respectfully submitted,

J. D. MILLIKEN,  
R. J. OSBORN,  
H. F. MASON,  
J. W. PARKER,  
Committee."

It was moved and seconded that the report of the committee be adopted. Quite an interesting discussion occurred on this motion, which was participated in by T. F. Garver, R. B. Welch, R. T. Herrick, S. H. Allen, Sam Kimble, J. W. Parker and others, and at the conclusion of which, S. H. Allen suggested that as this was a matter of great importance the various matters covered by the report be taken up separately and so passed upon.

By President Kimble: A division of the report of the Committee on Amendments to the Laws has been requested, and it will be so ordered.

By R. B. Welch: I move we hear the report of Justice Cunningham, Chairman of the Committee on a More Satisfactory Method of Admission to the Bar now and postpone this other matter until after dinner.

The motion was seconded and carried.

By E. W. Cunningham: I think the bill ought to be read and without any discussion endorsed and recommended for passage.

By J. B. Larimer: I should prefer to hear the bill read.

By President Kimble: Mr. Perkins will please read it.

An Act in relation to the admission of Attorneys-at-Law and providing for the examination of those persons desiring to be admitted to practice law, and repealing Sections One

and Two of Chapter Eleven of the General Statutes of Kansas of 1868.

*Be it Enacted by the Legislature of the State of Kansas:*

Section 1. The Supreme Court shall adopt suitable rules to govern the admission of attorneys-at-law to practice in this State, in conformity to the provisions of this act, and prescribe the educational qualifications which shall be required of each person to entitle him to the examination herein provided for. Said rules shall be printed and furnished to the Board of Examiners hereby created who shall supply them and any other necessary information to applicants for said examinations.

Sec. 2. Any person, of either sex, twenty-one years old, a citizen of the United States, and a resident of this State, shall be permitted to practice law in all the courts of this State upon complying with the requirements and passing the examination hereinafter provided for.

Sec. 3. Any resident graduate of the law department of the University of Kansas shall be admitted to the bar of any court in this State upon the production of his diploma from said University.

Sec. 4. All persons who shall have been admitted to practice in the Supreme Court of any other state or territory of the United States, and who shall be residents of this State may be admitted upon production of their certificates of admission to practice in said courts, upon satisfactory proof of their having been engaged in actual practice in such other state or territory at least two years prior to application for admission to courts of record in this State. Such proof may be a certificate of any judge of a court of record, knowing the fact under the seal of such court.

Sec. 5. Any graduate of the law school in any other state or territory or District of Columbia which shall require a three years course of study, and be accredited by the State Board of Law Examiners provided for in this act, as a school of equal standing as the law school of the University of this State may be admitted to practice in any court of record in this State on production of a certificate of graduation from said law school, countersigned by the President and Secretary of said State Board of Law Examiners.

Sec. 6. A State Board of Law Examiners is hereby created to consist of five members of the bar of at least seven years standing, who shall be appointed by the Supreme Court of this State, whose duty it shall be to hold, regulate, supervise and control examinations for admission to the bar. The term of office of said examiners shall be four years, except under the first appointment, which shall be for terms of two and four years; two examiners being appointed for two years, and three for four years, and until the appointment of their respective successors. The Supreme Court shall appoint said examiners on or before the second Tuesday of July, 1901. Said board shall meet at least twice in each year at the Capitol and at such other times and such other places as the Supreme Court may direct, for the purpose of examining applicants for admission; and upon such examination being had, said board shall issue to such applicants as they find possessed of sufficient learning at the law, ability and otherwise qualified, a certificate of qualification for admission to the bar. The residence and age of the applicant shall be made to appear to said board by affidavit, and satisfactory evidence shall be produced by such applicant of good moral character and of having pursued the study of the law for at least three years prior to such examination. The Supreme Court shall fill all vacancies which shall occur in said board for the unexpired term.

Sec. 7. Examinations shall be conducted by written or printed interrogatories, in whole or in part, and be as nearly as possible uniform throughout the State. Such examinations shall be held by the examiners as a body, a majority of whom shall constitute a quorum. Each applicant for admission must sustain a satisfactory examination upon such subjects as the board, with the approval of the Supreme Court, shall determine, and any applicant who shall fail in any examination provided for in this act shall not be eligible for re-examination until he shall produce satisfactory proof of having further pursued the study of the law for at least six months after said failure. The board shall certify to the Supreme Court every person who shall pass a satisfactory examination, provided such person shall have in other respects complied with the rules regulating the admission of attorneys; and upon the presentation of such certificate, if the Supreme Court shall find such person of good moral character,

it shall enter an order licensing and admitting such person to practice law in all the courts of this State and such person shall be furnished by the clerk of said court with a duly certified copy of such order of admission without the payment of any fee other than that hereinafter provided.

Sec. 8. Every person applying for examination under this act shall pay a fee of fifteen dollars to the State, which shall entitle the applicant to a second examination, as provided in this act, in case such applicant should fail to pass the first examination.

Sec. 9. There shall be paid out of the treasury to each examiner as a compensation for each day actually spent in conducting said examinations the sum of ten dollars and his actual and necessary expenses in going to, holding and returning from such examinations.

Sec. 10. As soon as practicable after their appointment the members of said board shall meet in the City of Topeka and organize by the election of a President, Secretary and any other officers the board may deem necessary. The board shall divide the work of preparing for the examination of applicants, as they may deem best, and the labor of preparing the questions, blanks and forms for such examinations, shall be suitably paid on the recommendation of the Supreme Court. The State Printer shall print all such questions, blanks, and forms as may be required for conducting such examinations.

Sec. 11. This act shall not affect persons who have heretofore been admitted to practice as attorneys in this state.

Sec. 12. Sections One and Two of Chapter Eleven of the General Statutes of Kansas of 1868 are hereby repealed.

After some further discussion the motion on the adoption of the report was unanimously carried.

By Mr. Slonecker: In the absence of the Memorial Committee, I move a special committee be appointed consisting of M. P. Simpson, of McPherson, G. W. Clark, of Topeka, and F. L. Martin, of Hutchinson, to make report of the death of members of this Association during the past year.



The motion was seconded and carried. Later this committee submitted its report, which is as follows:

### REPORT OF SPECIAL COMMITTEE

TO PREPARE A MEMORIAL UPON THE DEATH OF THE HONORABLE  
Z. L. WISE.

Mr. Z. L. Wise was born near Youngstown, Mahoning County, Ohio, April 10th, 1847, and was married to Nannie S. Glenn at Columbus, Ohio, December 20th, 1877. He studied law with Ex-Governor Todd and graduated at Ann Arbor in 1870. In 1871 he located at Pine Bluff, Arkansas, and engaged in the practice of law with the late Judge John A. Williams as his partner. He was elected District Attorney for the Eleventh Judicial District of Arkansas in 1874 and re-elected in 1878. Afterwards he was appointed receiver of the United States Land office by President Arthur. In 1887 he became a citizen of the State of Kansas, locating at Hutchinson, where he immediately began the practice of his profession.

As a successful lawyer he reasoned logically and relied largely upon principles upon which he was well informed. He cited few authorities in presenting a case to the court, but those cited were applicable and to the point. He was a gentleman of high character, with a very high conception of the honor and integrity of the legal profession and of the duties of a lawyer, and these qualifications soon brought him into prominence and he held different offices of trust at the hands of the people. He was City Attorney of the city of Hutchinson in 1890; County Attorney in 1891 and was elected to the legislature from the Eightieth Representative District in 1898 and 1900.

His death at Topeka, Kansas, on the 8th day of January, 1901, at the time of the convening of the legislature was sudden and unexpected. His social qualifications endeared him to his friends and to his family. He was faithful to all who were numbered as his friends. He loved to entertain them in

his home and he will long be remembered by them for his many good qualities. He was faithful in performing the duties and responsibilities cast upon him by the office which he held, and it is believed by his friends that his sudden and untimely death was the result of his determination to faithfully do and perform all of the duties of his office. Mr. Wise became a member of the Association in 1899, and his death is sincerely regretted by all.

M. P. SIMPSON.

F. L. MARTIN.

GEO. W. CLARK.

AFTERNOON SESSION.

*2 o'clock, February 1, 1901.*

President Kimble called upon S. H. Allen to preside temporarily, who took the chair and introduced O. G. Eckstein, of Wichita, who read the address of Thomas B. Wall, of Wichita, entitled, "The Bankruptcy Law." It will be found in its proper place following these minutes.

Section 7 of the report relating to verdicts by three-fourths of a jury was then read. C. A. Smart, of Ottawa, made a motion that this provision be disapproved.

By J. T. Herrick: I move the whole matter be laid on the table. I will limit the motion to this particular section.

By C. A. Smart: I will withdraw my motion to disapprove of this section.

By J. T. Herrick: I now move to postpone consideration of this particular section until our next session. The motion was seconded and carried by a rising vote of twenty to fourteen.

On motion the report of the Committee on Legislation, as amended, was adopted.

By E. A. Austin: I move that the Committee on Amendments to Laws recommend that the official stenographers of the District Courts when required to make manifold copies of a case-made, shall do so at three cents a folio, and that the

cost of making one or more copies be taxed the same as other costs in a case.

By J. D. McFarland: I move to amend the motion so as to read that the official stenographers of the District Courts shall be required to make a transcript of testimony or other matter pertaining to a case when so requested; and that for a manifold copy or copies thereof, when ordered, he shall receive three cents a folio. This amendment was seconded and carried.

The Committee on Nominations reported as follows:

# REPORT OF THE COMMITTEE ON NOMINATIONS FOR THE ENSUING YEAR.

*Mr. President:* Your Committee on Nomination of Officers for the ensuing year beg leave to report the following nominations:

*President,* Silas Porter.

*Vice-President,* B. F. Milton.

*Secretary,* D. A. Valentine.

*Treasurer,* Howel Jones.

*Executive Council:* J. G. Slonecker, Chairman; C. W. Smith, F. Dumont Smith, H. F. Mason, C. B. Graves.

*Delegates to the American Bar Association:* B. P. Waggener, W. H. Rossington, H. Whiteside.

*Alternates:* L. H. Perkins, H. C. Sluss, H. P. Farrelly.

All of which is respectfully submitted,

J. T. HERRICK,  
G. H. LAMB,  
T. E. DEWEY,  
FRANK WELLS,  
W. H. VERNON,  
Committee.

Which report was unanimously adopted.

A motion to adjourn without day was then seconded and carried.

D. A. VALENTINE, Secretary.

**TREASURER'S REPORT.**  

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*Topeka, Kan., January 15, 1901.*

To the Bar Association of the State of Kansas.

Your Treasurer begs leave to make the following report:

Amount on hand at date of last report.....	\$379.47
Amount received from dues of 1899.....	48.00
Amount received from dues of 1900.....	198.00
Amount received for admission fees.....	65.00
Total.....	<u>\$690.47</u>
Total expenditures.....	<u>\$566.42</u>
Balance on hand January 15, 1901.....	\$ 124.05

Respectfully submitted,

HOWEL JONES, Treasurer.

## THE BANQUET.

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The evening of the second day of the meeting was given over entirely to the annual banquet in the Hotel Throop, Topeka. It was probably the most enjoyable of the many given by the Association, the toasts being specially happy in selection and response.

For the purpose of pleasurable preservation, the Secretary here inserts the program:

*Magister Convivii*—B. F. MILTON.



“The time has come,” the walrus said,  
“To talk of many things;  
Of shoes—and ships—and sealing-wax—  
Of cabbages—and kings.”

—Carroll.

*The Court That Was* . . . . . Silas Porter  
“Forever honor’d and forever mourned.”

—Pope.

*The Lawyer of the Future* . . . . . E. F. Ware  
“Best of all  
Among the rarest of good ones.”

—Shakespeare.

*The Last Guess* . . . . . C. A. Smart  
“Such virtue is there in a robe and gown!”

—Dryden.

*The Printer and the Lawyer* . . . . . Henry J. Allen  
“Though an angel should write, still ’tis devils must print.”

—Moore.

*Law Books* . . . . . *F. L. Martin*

"Great store of good books, through the great mercy of God,  
Are common among us. He that cannot buy, may borrow."

—*Baxter*.

*Kansas Lawyers* . . . . . *J. G. Slonecker*

"God bless us every one."

—*Dickens*.

*Kansas Lawyers, continued* . . . . . *Sam Kimble*

*The Enlarged Supreme Court* . . . . . *J. C. Pollock*

"So comes a reckoning when the banquet's o'er—  
The dreadful reckoning, and men smile no more."

—*Gay*.

## ADDRESSES.

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### PRESIDENT'S ANNUAL ADDRESS.

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SAM KIMBLE.

*Gentlemen of the Bar Association of the State of Kansas:*

On calling you to deliberative attention at this, the first meeting of the Association on the threshold of the Twentieth Century, I, as your presiding officer, shall endeavor to inaugurate a change in the usual practice by making the annual address as short as the dignity and importance of the position may justify and keep within what I believe to be the legitimate field of the official position, by briefly reviewing the work of our profession and suggesting such ideas as may seem to me to be for our general good.

Heretofore, it seems to have been the custom for the President's annual address to treat of some special theme widely different from the idea of a general review. While this practice in the past has been highly justified and has given our records some most able papers on special subjects, I feel that I may properly waive the opportunity afforded by such usage to treat at length some ideally interesting branch of law study; and out of respect for the fact that the mind of man *does* attach significance to the opening of a new Century, in the solemn march of time, even though in a coldly practical way, we may admit it really makes no difference, only being an incident of the sequence of numbers, I shall content myself on this occasion by keeping strictly within the lines of what I believe to be the particular duty of a presiding officer, and

confine my address to that which shall be in the nature of "a message," leaving the discussion of special text law subjects to others on the program.

CONGRATULATORY.

Our profession can be congratulated on its present status and the progress it has made in this nation during the last century. I am proud to feel and to say that the Bar of Kansas may be justly praised and congratulated upon the work accomplished in the troubled years of the growth of jurisprudence in this State, and upon the high standing the profession sustains at home and abroad. A record covering less than fifty years, with a people impulsive, liberty-loving, sanguine and volatile; with a multitude of legal propositions new and peculiar to our condition, doubly perplexing at times of solution as viewed from the necessary dual consideration, strict adherence to the right, precedent and justice of the cases or modified imperatively by the possible effect the promulgated decision might have upon an hundred other public advantages, we have steadily marched forward until there has been builded in our young commonwealth a legal history at once creditable to the State and to the profession which made it.

By force of necessity, the machinery of our judicial system has grown through some unsatisfactory and experimental stages, all of which we now fondly hope have passed away. Especially may this be said of our Appellate Court system. It was long recognized by Bench and Bar that our Supreme Court, as heretofore constituted, was physically unable to perform the demands required of it, by our Constitution, our judicial system and the wonderful growth of our people, and the vast magnitude of their business interests. The solution of this, seemed easy to suggest, but was found exceedingly difficult to provide, and it has only been intelligently accomplished at the opening of this, the new century, by the constitutional change, increasing our Supreme Judicial body to its



proper numerical strength, among the Courts of Review of other states of the Union. This happy, though delayed, result, I may justly say, must be very largely credited to the purely patriotic efforts of the members of the Bar of the State, and in no slight degree, to the organized work of this Association. It is but fair to the special committee, appointed by this body, to the duty of securing the adoption of the late constitutional amendment, to say, that while the members, each and every one, worked most faithfully to secure the adoption of the amendment, they did so, only as patriotic citizens, and were not in the slightest degree actuated by any personal interest. The committee's composition was non-partisan, and it worked on absolutely non-partisan lines. In further evidence of the absence of any self-interest, I am at this hour able to say, without violating any secret, that Governor Stanley labored hard and long with each member of the committee to force an acceptance of the judicial appointments won to the profession by our success, but that each member as firmly declined the honor as it was earnestly tendered. However this may be in truth, the fact is ours, that we now have, by the will of the people of Kansas, a Supreme Court of ideal strength numerically; and while the Governor is still in some doubt as to the element of ability, it is the general sense of this Association that we may safely indulge a hope.

#### THE NEW SUPREME COURT.

It would be repeating only what you all know to expend much time in describing the new conditions surrounding our Supreme Court, and inasmuch as this "expanded body" will, without doubt, at an early day, promulgate to the public, and more especially to the legal profession, a carefully prepared set of rules which shall give the details and orders regulating the practice before it, I shall not take the time further than to generally say: The Supreme Court as now constituted, came into existence by virtue of the constitutional provision on

Tuesday, January 15th, 1901, and while the amendment has not made the organization, at present, as clear as might have been done, yet by common consent, and in perfect accord with the wishes of the Bar of this State, and in recognition of the eminent ability of the Chief Justice heretofore filling the position, it is understood that the Honorable Justice Doster shall continue as the Chief Justice of the Court.

By reference to pages 518 and 519 of the Session Laws of 1889, where will be found the authentic joint resolution which is now a part of our constitution, it will be discovered that "the Justice who is senior in continuous term of service, shall be Chief Justice", etc., which language, by strict constitutional interpretation, might lead us to the conclusion that Justice Johnston, who has become senior in service "since the memory of man runneth not to the contrary," would be from this point, treated as Chief Justice; but inasmuch as the Chief Justice in legal effect can have no more weight and authority than any other Justice, the position is immaterial to the actual work of the profession and it is pleasing to note the disposition throughout the state to extend the honor involved in the name, to one so deserving of it, and that it shows a chivalry of spirit, subordinating all ideas of partisanship. So may it be forever with this Honorable Court.

The new differs from the old Supreme Court in the fact that it is divisible, and may sit separately, in two divisions, with full power in each division to determine the cases assigned to be heard by that division, except when special cases shall be ordered to be heard by the whole Court. Where cases are heard before a division of the Court, the decision must be concurred in by three of the Justices sitting in that division, or in other words, where a division is the minor one, composed of only three Justices, the decision must be unanimous. Where a case is heard before the full Court, then the decision must be concurred in by four Justices.

The details and technical rules of practice before the new

Court, will, like the old, be provided within constitutional limits by the Court itself, and will necessarily involve such changes over the former practice as the new conditions will make necessary, and it will be important that all members of the Bar give early attention to such new rules as may be promulgated.

In connection with the subject of the Supreme Court, I cannot refrain from availing of this special opportunity to again call the attention of both Bench and Bar, as well as the public, to an ideal of my own, however much I may be regarded as a crank upon the subject, and however much the idea may appear to some as impracticable.

As a patriotic citizen and as a thoughtful lawyer, I am none the less personally convinced that the idea to which I refer is worthy of most careful consideration by the statesmen of our wonderful Republic. This idea I first suggested at a time when political feeling ran high in our country, verging closely upon the lines of unfair criticism toward the decisions of our Supreme Judicial bodies when disposing of constitutional questions. While partisanship and political feeling is fortunately at this time somewhat allayed, it would be foolish to imagine that the same venomous feeling may never arise in the future.

It is the duty of the thoughtful citizen having the permanency of our Republican form of government at heart, to consider at all times those things which may tend to avoid bitter partisan feeling on occasions of intemperate political turmoil. It was with this view and in the full confidence that the idea I suggested was valuable, that in 1896, at a time when thousands of patriotic citizens broke, for the time being, at least, the strict ties of party affiliation, in the support of what they believed to be the better principles of good government, I offered, in the shape of a plank which I hoped might be embodied in the platform of a party organization, which seemed to me to be assembled under as patriotic an inspira-

tion as ever actuated any political movement; and while this plank, for sufficient reasons, was not at the time embodied in the platform at Indianapolis, I was gratified, to know, that it received very favorable consideration and commendation from many leading lawyers, and from statesmen of unquestioned patriotism and ability.

The plank as framed had special reference to the Supreme Court of the United States, but the principle involved should have the same application to the Supreme Courts of the various states of the Union.

I give you the plank in the language it was given then, and commend it to your thoughtful consideration.

"Recognizing in the growth of our country the severest strain and test of the wisdom of the Fathers in establishing a government wherein the great plan of '*checks and balances*' was relied upon, in the form of three co-ordinate departments, intended to be equal and independent in the general powers, producing an harmonious whole, we reaffirm our confidence in the wisdom of such plan, and our determination that it shall be forever maintained as the best and only Democratic plan of government on earth. In doing so, we are, however, not adverse to an honest and patriotic study of any possible defects in the details of the original plan, with a purpose to remove any errors which the thoughtful experience of more than a century of practice may indicate, and we therefore feel constrained to suggest that it is but wise to consider, at all times, the necessity of the *fullest confidence* of the mass of our people in the action of each of the co-ordinate branches of our government.

"Our theory of Government is in the main, averse to the decision of ONE, but relies with confidence upon the voice of the WHOLE. From very necessity, the Judicial branch of the Government must, in matters of Constitutional right, become the final arbiter, and to the end, that its determination shall have that HIGHEST confidence and respect, as being the deter-

mination practically of the WHOLE, rather than of ONE, we would commend to the thoughtful and patriotic consideration of our country, the advisability of the following Amendment to our National Constitution:

*"That before any act of Congress which shall have been regularly enacted according to the general forms provided for the enactment of laws by Congress, and duly approved by the President as the Representative of the Executive Branch of the Nation, shall be held void by the Judicial Department of the Government as being in conflict with the Constitution, such decision shall be the concurrent opinion of seven (7) Judges of the Supreme Court."*

It will be discovered that as applying the same principle to the Judicial powers of our State, and in view of the fact that our Supreme Court, instead of being composed of nine, is now composed of seven Judges, my idea would be: *"That before any act of the Legislature, which shall have been regularly enacted according to the general forms provided for the enactment of laws by the Legislature and duly approved by the Governor as the Representative of the Executive Branch of the State, shall be held void by the Judicial Department of the State on the sole ground that it is in conflict with the Constitution, such decision shall be the concurrent opinion of five (5) Judges of the Supreme Court."*

#### OTHER SUBJECTS.

I ought to briefly comment upon legislative subjects, but in view of the fact that the Legislature is now "in the agony of travail," it may be wise to leave it free to work out its own destiny, with the hope that even if it does not assist the profession, by the adoption of more wholesome legislation than in the past, it may refrain, at least, from complicating conditions more seriously.

One particular matter, however, ought to be referred to as a part of this review, and that is our lamentable experience in respect to railroad legislation. Since the last annual meeting of this body, we have witnessed a Court, invested with all of the characteristics of a Judicial body and a name sufficient in

itself to lose it, on its first visitation into the wilderness of railroad control, practically wiped out of existence, not by its own decision, but by the legitimate effect of the decision of a constitutional court; and to-day, we can only look upon the record, making the inuocuous Court of Visitation a part of our judicial history with regret, tinged with the disposition to laugh at the absurdity of its existence. We should draw from its brief history, the importance of more conservative judgment and consideration in any future attempt to provide for the judicial determination of subjects properly within constitutional limits.

It is seriously to be hoped that in the future history of the jurisprudence of this State, no spasmodic and ineffective efforts like the one referred to may ever again transpire.

#### A KICK.

It has become fashionable for many people, when they have the opportunity, to register a kick against some custom or evil specially impressing itself upon their attention.

The Honorable Chief Justice of our Supreme Court has recently set the pace and while using a more polite term, "a knock," against his particular *bete noir*, "the College student," gives me a precedent on this occasion to indulge in my "knock," which I prefer to express in the better Saxon, a "kick," against an evil that I feel is pressing itself too seriously in these years upon the legal profession.

To the practitioner residing at the State capital, and having the valuable privilege of access to the magnificent State library, this matter cannot be so important, but to the country lawyer, filled with the laudable ambition to be well up to the front, the subject of which I now speak, will be of more than passing interest.

In this world we derive knowledge from experience, and I doubt not that thousands of able members of the profession, could give evidence of an experience and conclusions like those which have come to your speaker during his practice in

the last quarter of a century. In that time, I have had, I presume, ups and downs, disappointments and successes usual to the common every day lawyer, and can truthfully say that the dreams so fondly entertained at the outset have in no sense been fully realized, although I could not properly say but that I had met with the average success.

Every mechanic, artisan and professional man is supposed to provide himself with such tools and implements as shall be reasonably necessary to the successful transaction of his business. The carpenter, with proper and modern wood-working tools; the physician, with instruments which modern science and inventive genius have provided for successful work in surgery; and so in all other lines, including the legal profession. But for some years, the commercial instinct, pervading all the phases of human action, has, it seems to me, infringed more disastrously upon the legal fraternity than the exercise of good judgment should have permitted.

In these years, I have paid out in cold cash for the books now on the shelves in my office, beyond \$2,500, and recently have become confronted with the very unsatisfactory knowledge, that should I die to-day, all of this investment could not possibly realize to my estate and to my family scarcely \$800. This fact leads to the pertinent inquiry, as to why the practicing lawyer cannot invest in the implements and instruments of his profession with some idea of more permanency of value. The law is not a romance or a dime novel, purchased for the entertainment of the hour, and purely a work of imagination. The law is supposed to be founded upon eternal Justice, and in our higher ideal, unchangeable and certain, and the books well bound, within which we should find it recorded, ought to be valuable; and so long as their condition is properly preserved, should retain their value without unreasonable deterioration. We pay a dime or a quarter for a novel, purely for the purpose of entertaining ourselves while it is read, and are content to use it paper bound, but we purchase a law book,

supposed to contain the settled rules governing personal conduct and business transactions, the regulations of the social fabric, with the idea that we have invested in something which shall be valuable not only for the use of the day, but to all who shall have reason to seek to inform themselves as to those rules; and the book should have a reasonable continuance of value based upon the first cost, like any implement purchased by a farmer or a carpenter, only depreciating from its cost by virtue of its deterioration by use.

Inventive genius might very naturally wholly destroy the use of some particular implement, but it seems strange to conceive how, when the law is supposed to be immutable, the republication, should render the original prints valueless.

Bench and Bar recognize the American Encyclopedia of the Law, originally issued in 29 volumes, as a very complete and really valuable investment for the every day practitioner at \$6.00 per volume, but commercial persistence within a few hours after the completion of the first publication of the work, said to me: "The work for which you have paid us \$174 is now without value in the market and to your estate for the simple reason that we, the law book publishers, have decided to load the profession again with a re-issue of the same work, and which we will kindly permit you to receive by paying us \$6.00 per volume in cash and the return of the like volume of the original print." Many very well meaning lawyers promptly yielded to the "Moloch" of commercial demand, and paid tribute, again, to the activity of the law publisher.

This is only one instance, and I am here to say that the legal profession has been gradually intruded upon in this respect, yielding the legitimate income of our not very profitable work as lawyers, to the coffers of the insatiate law book publishers.

In the line of text books, the ambitious author, who perhaps has never tried a lawsuit, and the law publisher, work in union. The publishers of Case Law, the Reports, are by no



means far behind in this respect, and the result of it all is that the lawyer is not only being abused by such distinguished characters as Editor Murdock, of Wichita, who has recently, as I understand from the public press, expressed a desire that "lawyers and judges should be hanged," but is being worked to the full limit financially, and to such an extent that if the profession does not protect itself, we may be legitimately characterized as "chumps" in a business sense.

My suggestion would be, that while ambition should prompt us to be as up to date as possible, we should control that ambition and see to it that we do not unwisely invest too much of our earnings in the fictitious value of the various law publications presented to our attention. And I would further suggest that the grievance is of sufficient importance to justify concerted action to the end that more condensed publication of Case Law might be given to the profession. Thousands and thousands of absolutely useless decisions, that now simply serve to pad the covers of law reports, ought to be intelligently barred from the publications, and this can certainly be done where the publication of Case Law is, like ours, within the control of the State itself.

It is needless for me to say to the old lawyer, but I do say to all young lawyers, that while it is your duty to provide yourself with a proper library, I would urge you, and urge you strongly, to scrutinize with extremest care that which you buy, and that you resist with all the business discretion within your power, the siren voice of the delightful individual who will early call at your office and sooth you into the belief that your ambition to succeed in the practice of the law cannot possibly be satisfied except that you purchase the publication he presents. This, gentlemen, is my kick.

#### REVISION OF THE STATUTES.

The suggestions last made naturally lead to the consideration of the present condition of the statutes of this State, and

upon which subject I feel it proper to say a word, and with which I shall refrain from further claiming your attention.

It is a fact that the profession is today laboring under much difficulty in not having an authentic, well digested and uniform revision of the Statutes of Kansas. It is true we have many revisions, all of which are unsatisfactory and the time seems to be here when a modern Justinian could be of most excellent service.

In the past, there has been a somewhat fitful uncertainty on the part of those invested with authority to determine whether the publication of what are ordinarily termed "Revised Statutes" should be left to private enterprise or disposed of in the more practical and satisfactory way, by the State.

Since the publication of what is known as "The Revised Statutes of 1889," which was largely a private enterprise, but as highly satisfactory in my judgment as any we have had, there has grown up a series of illy considered, half way efforts at revision, and to-day, the legal fraternity is completely at sea. By common consent, the revision commonly known as "The Webb Statutes," have not proven satisfactory and a very large number of our practitioners and judges still refer to the 1889 Revision, or a practical re-print of the same under the title of the 1899 Revision.

I have taken some pains to investigate the actual expense of the publication of a revision of the Statutes. I find that the actual cost of the paper, printing and binding of Revised Statutes in two volumes, would be \$1.90 per set. I find that of the Revision of 1897, (the Webb Statutes), 7,000 copies were sold. The books were well printed and splendidly bound, so that no criticism could be offered as to the mechanical sufficiency of the publication.

There are 1,700 lawyers in the State, and over 500 active Kansas lawyers practicing in other states; there are 110 National banks; about 300 banking institutions of other characters; 50 loan and trust companies; notaries public having use

for statutes, over a thousand; law schools and law libraries in the United States, over 500; to supply the state, county and township officers, including one set for each Justice of the Peace, requires 6,668 sets. All these interests are actually demanding a carefully considered, wisely prepared and early publication of a properly authenticated revision of the Statutes of Kansas.

It is my recommendation that this should be done by a commission of not less than three conservative lawyers to be provided by the present Legislature, under suitable restrictions, and with time sufficient to enable the work to be so carefully and properly compiled that when issued, it could be at once taken as a permanent mile-stone in our legal history, and that all the unsatisfactory publications back of it might be safely relegated to the reference shelves. When the commission has compiled the work and the Legislature has authenticated the same, then the publication should be secured by the State under contract and the books sold for the lowest possible cost. The Bar Association will, for a second time, render an invaluable public service by securing to the people of the State, the Revision suggested.

Gentlemen, I thank you from my heart for the high honor you conferred upon me at your last session in selecting me to preside over this Association, and for your very kind attention, and I now await your further pleasure.

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## THE DOCTRINE OF LOCUS PŒNITENTIÆ.

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PEYTON CARTER.

There are few better opportunities for acquiring a proper appreciation of the clemency of the law, than is accorded to one by an investigation of the quite well established policy of the courts, of allowing, in certain cases, a withdrawal in safety from some false position, even after it has been assumed by

one, either thoughtlessly or deliberately. It seems clearly the spirit of the law to desire a readjustment of matters so that justice may be secured and public policy advanced. And it will be our province in this essay to note more carefully this doctrine of *locus pœnitentiæ* as it is recognized in our courts to-day.

Mr. Bouvier defines this term as, "The opportunity of withdrawing from a projected contract before the parties are finally bound, or of abandoning the intention of committing a crime before it has been complete." And although this is substantially the definition found in the other standard dictionaries, in the light of our present study this seems to be more nearly the popular conception of the term, for like "malice," it has a strict legal use and not until we come to study its application to recoveries in connection with certain illegal contracts will an element be found which gives it a purely technical meaning in law.

In its use in criminal law it seems well settled that where there is an intention to commit a crime, a time for repentance is always allowed until there is some overt act towards its commission. (McLain, sec. 223.) This privilege of abandonment of the unlawful design is recognized to exist until an act is committed which is the first step in the crime of attempt. (McLain, sec. 224; 1 Bish. crim. sec. 733.) "Mere intention, unexecuted, does not constitute a contract, a tort or a crime, and is not the subject of legal or equitable judicial investigation." (*Parmelee v. Sloane*, 37 Ind. 470.) It is in keeping with the spirit of the law to allow a man to repent of his evil intention or act, at any time before public policy is contravened.

Where one of two parties to a combination to do an unlawful act, abandons the common purpose, he was allowed to relieve himself from the liability for acts subsequently done by the other in pursuance of the plan, as where two prisoners making an attempt to escape and one of them shot and killed

the guard. But just before the fatal shot, the other prisoner had gone back to his cell claiming he had abandoned his purpose. On being tried on the charge of murder in the first degree, the court held that if the going back to the cell was a genuine abandonment of the purpose, a *locus pœnitentiæ* should be allowed. (*State v. Allen*, 47 Conn. 39.) It is necessary that the intention to commit a crime should be co-existent with the act. (*U. S. v. Riddle*, 5 Cranch, 311; *State v. Douglass*, 44 Kan. 618.) And the courts have gone so far as to say that if one is in the wrong in the first instance, an opportunity for repentance is always allowed, and if he desists from his fighting and abandon in good faith the conflict, and retreats as far as possible, and then it is necessary to take life to save his own he is justifiable. (*State v. Partlow*, 90 Mo. 608.) But where one having made preparation for burning a building, left his supposed accomplice at the place, saying he wanted to go and get some matches, but did not return, and in an hour or so afterwards was arrested, the court held that his failure to return was not proof that he had abandoned his purpose. (*State v. Hayes*, 78 Mo. 307.) We can infer from this that had he evidenced his abandonment by some word or act, his withdrawal even at that "eleventh hour" might have been effective. (*State v. Gray*, 55 Kan. 135.) From what we gather from the authorities, the opportunity for repentance ends with the first criminal act, although if one intends to commit a crime and concurrent with this intent does what constitutes a lesser crime of the same nature, he may by abandonment of his original purpose, be only chargeable with the lesser offense. (*Young v. State*, 82 Ga.)

Thus far in our study it is difficult to see any element in the term which is only peculiar to the law, for it seems a fundamental principle of our spiritual nature, that any evil intention may be abandoned before it is executed. But in the remaining portion of this article we wish to point out a use which is peculiar to the law.

There is a principle of public policy that no court will lend its aid to a man who founds his cause on an immoral or an illegal act. And it must follow that when the parties to an illegal contract are equally at fault, the condition of the possessor or defendant is the better. And the justice of this principle is not the protection it gives to the defendant, but the disability it imposes on the plaintiff. Out of this has grown the general rule which was stated very pointedly by Lord Wilmot, "Whoever is a party to an unlawful contract, if he have once paid the money contracted to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again." (*Collins v. Blantern*, 2 *Wilson* 341; *Bert v. Place*, 6 *Cow* 481; *Hawson v. Hancock*, 8 *term* 575.) But this rule has several exceptions and one of these is the allowing of a *locus poenitentiae* to the disaffirming party, and to this exception we wish now to direct our attention.

It will be noticed that the illegal contracts in these cases are executory, the parties are in *pari delicto* and the object of the illegal agreement has not been accomplished. The recovery is allowed, not on the contract, for that is void, but in disaffirmance of it by the withdrawing party, for the courts are desirous of helping a repentant man out of his otherwise remediless condition. The rule stated by Parsons (*Cont.* vol. 2, 746) is, "all contracts which provide that anything shall be done which is distinctly prohibited by law, or morality, or public policy, are void; so he who advances money in consideration of a promise or undertaking to do such a thing, may, at any time before it is done rescind the contract and prevent the thing from being done and recover back his money." So, upon a fictitious assignment of goods to a third party with a view to defraud creditors. A bill of sale was given the defendant by the assignee, and with full knowledge of the circumstances, the defendant sold the goods although the plaintiff had demanded them back. The fraud contemplated was not accomplished as against the creditors and the plaintiff.

iff was allowed to recover, the court holding that until an illegal purpose is carried out there is a locus pœnitentiæ for one who has contributed goods or money for such a purpose, thus putting everybody in the same situation they were in before the illegal transaction was determined upon and before the parties took any steps to carry it out. (*Taylor vs. Bower*, 1 Q. B. Div. 300.) Also where both parties decided to withdraw from an illegal contract entered into for the purpose of defrauding the government by making some illegal transfers of land, both parties availed themselves of a locus pœnitentiæ and the court allowed each to recover from the other what had been transferred. (*Skinner v. Henderson*, 10 Mo. 205.)

In the famous case of *Knowlton v. Spring Co.*, (103 U. S. 49) the New York courts, refusing to follow the weight of authority, both American and English, decided that, when a corporation increased its capital stock in contravention of the statutes of that state, and a subscriber paid a twenty per cent. assessment on the shares allotted to him, he could not recover back from the corporation the amount so paid, the court holding that the contract was *malum in se* (*Knowlton* being a director), and was executed as far as the twenty per cent. assessment was concerned, and that the mere neglect of paying the other assessments and allowing his stock to be forfeited because of this, was not evidence of rescission on his part. But when the case went to the United States Supreme Court, Mr. Justice Wood decided that the agreement was *malum prohibitum* and not *malum in se*, that it was executory and that a locus pœnitentiæ should be allowed the plaintiff. The court said, "The rule is applied in a great majority of cases, even when the parties to the agreement are in *pari delicto*, the question which of the two parties is the most blamable being often difficult of solution and quite immaterial." So where money was deposited with one to be used for an illegal purpose, the depositor might countermand his order at any time before the money was so used and recover his

deposit. Even if this deposit was used illegally and a second was made for the same purpose, at any time before it was so used a locus pœnitentiæ remains in regard to it, if it is a separate and distinct transaction from the former. (*Pelar v. Grime*, 149 Pa. St. 163.) And in a case where money, in pursuance of a scheme immoral and against public policy, had been given to another for the purpose of bribing an office of high station, but instead of being used for this purpose, the receiver applied the money to his own use, a California court held that he was answerable to the one of whom he received the money. (*Wasserman v. Sloss*, 117 Cal. 425.)

In wagering agreements the application of this principle is well settled among all the modern authorities. In all cases of wagers where money is advanced from one to the other it is recoverable at any time before the happening of the event upon which the wager depends. In case money is deposited with a stakeholder it is recoverable at any time before it is paid over to the winner. (*Tarlton v. Baker*, 18 Vt. 9; *Bernardo v. Taylor*, 23 Or. 416.) Until this is done, a locus pœnitentiæ must be allowed the depositor that he may disaffirm the contract. To take from him his remedy would be virtually to give effect to the illegal contract. (*Wheeler v. Spencer*, 15 Conn. 28.) The court said, in one case, that the "agreement to deposit money with a stakeholder was void and a party betting could treat it as no contract and recover back his money. The title to the money is not and cannot be passed by such a contract. In pari delicto, and potior est conditioni possidentis, has no application." (*Shannon v. Baumer*, 10 Iowa 210.)

In all the cases to which this doctrine applies, the illegal purpose is not effected, but it must be noted in this connection that sometimes a mere deposit of money accomplishes the illegal purpose. When one becomes bail for another, only after receiving a deposit from the defendant equal to the bond to indemnify him for the possible default of the defendant, it



was held in a suit to recover the deposit, that the illegal purpose was effected when the public lost the protection which the law affords for securing the good behavior of the plaintiff, and a recovery was not allowed. (*Herman v. Jencher*, 15 Q. B. Div. 561; *In re Great Steamboat Co.*, 26 Ch. D. 616.)

It must be observed, however, that when a man wishes to claim the benefits of this doctrine and disaffirm his illegal agreement, he must act promptly and fairly and give notice that he repudiates. (*Wharton Cont.* 1, 354.)

It seems in some cases where a statute does not declare a contract void, but only attaches a penalty, as in the usury laws, the statute is so drawn as to allow one who has made a usurious loan to refrain from consummating the act by receiving the excess over the legal rate, thus saving the penalty. Thus Justice Sharswood suggests that it was the intention of Congress under the National Bank Act of 1864, to allow a bank which had made a usurious loan a *locus pœnitentiæ* between the making and the maturity of the loan. (*Brown v. Bank*, 72 Pa. 209.). There are other applications of this term which might be studied, but which on the whole show no new element from those we have already found, such as allowing it for the return of a wife to a husband whom she has deserted, if in a prescribed period, or in allowing one to go on and perform a contract, after the declaration that he was not going to be bound by it. (*Dingley v. Oler*, 117 U. S. 502.) Also when an offer has not been accepted by an offeree, the party making it may withdraw it at any time, or one may recall a bid at a sale of realty before his name has been written down. And it is scarcely necessary to suggest that the term is also applicable to illegal agreements of corporations, subject to certain new elements such as "*Ultra Vires*," which cannot be further discussed here. (*Morawetz Priv. Corp.*, sec. 721, 722.)

There are two classes of illegal contracts in which a recovery is allowed for other reasons, and which must be carefully distinguished from those in which there is a *locus pœnitentiæ*.

And in the further development of this subject it might make its true application clear if some cases were cited in which the principle does not obtain, but which cases are closely allied to those in which it does. When the illegality of the contract is created by some statute, the object of which is to protect one class of men against another, a recovery of money paid in pursuance of such a contract is allowed in order to render the statute more efficacious, if the one disaffirming the illegal contract belongs to that class for whose protection the statute was passed. And neither in this, nor in the next class of illegal contracts to be mentioned, are the parties considered as being in *pari delicto*. Thus under a bankrupt act which was passed to prevent practices on bankrupts who had not obtained their certificates, a creditor refused to sign the certificate unless a sum of money was paid him by a friend of the bankrupt, and the money having been paid, it was held that the person who paid it could recover it back again. (*Smith v. Bromley*, 2 Doug. 696.) And also as illustrating this rule are cases in which banks or other corporations are prohibited under penalties from issuing bills or other securities, but no penalty is imposed on persons who receive the illegal securities and money paid for them may be recovered. (*Thomas v. City of Richmond*, 12 Wall 349.)

Another class of illegal contracts in which there is a recovery allowed is when frauds, duress or strong pressure has been used upon the one seeking to disaffirm it. Though a mortgage given by a father to prevent the prosecution of his son is illegal, he may sue to set it aside. Having executed it under strong pressure he is not in *pari delicto* with the mortgagee. (*Foley vs. Green*, 14 R. I. 618; *Smith v. Cuffe*, 6 M. & Selw. 160.) So an old woman who had been unduly influenced by her son-in-law, and the sureties on his bond, to execute to the sureties a mortgage to indemnify them for the defalcation of her son-in-law, was entitled to relief against the mortgagee, though she executed it to shield her son-in-law from punish-

ment, but did not seek the relief until the statute of limitations barred any prosecution of her son. (*Bell v. Campbell*, Mo. Sup. 25; S. W. Rep. 359.) In summing up these cases Mr. Frere says, "Where the law that creates illegality in the transaction was designed for the coercion for one party and the protection of the other, or where one party is the principal offender and the other is only criminal from a constrained acquiescence in such illegal conduct—in such cases there is no parity of delictum at all between the parties, and the party so protected by a law, or so acting under compulsion may at any time resort to the law for his remedy, though the illegal transaction be completed." (Note to *Smith v. Bromly*, 2 Doug. 696.)

The distinction between contracts *malum in se* and *malum prohibitum* is, on the authority of the best text writers, abolished, but some of them at least make an exception to the rule when it comes to granting a *locus pœnitentiæ* to allow recoveries under illegal agreements. For as Clark says (*Cont.* p. 494), "Although there is some differences of opinion on the subject, it is safe to say that in some cases of illegal agreements, at least if they are not *malum in se*, but merely *malum prohibitum*, a *locus pœnitentiæ* remains." But neither Anson (*Cont.* 200) nor Story (*Eq. Juris.* 1, sec. 298) seemingly attaches any importance to the distinction. And the courts have generally allowed recoveries in either case. (*Jeffreys v. Friklin*, 3 Ark. 227; *Knowlton v. Springs Co.* 103 U. S. 49; *Wasserman v. Sloss*, 117 Cal. 425; *Pullman Palace Car Co. v. Central Trans. Co.*, Fed. Rep. 164.)

Anson (p. 200) in his work on contracts illustrates, by two hypothetical cases, a sound distinction which indicates at least something of the spirit and policy of the courts in the application of the principle governing the recovery under such illegal agreements as are under present consideration. If one should give another \$1,000 to burn a certain building or to publish a series of defamatory notices of a third party, and

after, say six months, the building was not burned or the defamatory articles not published an action to recover the one thousand dollars could not be allowed because it would tend to enforce the illegal transaction. But if one were to place one thousand dollars to the credit of another in a bank to be used to buy dynamite to blow up the building or to purchase shares in the management of a newspaper with a view to the defamation of another, and the depositor should change his mind before the execution of the contract, it is presumed that he might recover any unexpended portion, as this would tend to prevent the illegal object from being carried out.

It seems certain that in the light of our present study, the doctrine of *locus pœnitentiæ* has an application and an efficacy in our tribunals of justice, which is well recognized and quite well defined. And while the courts have been much influenced by public policy, it may be safely said that where one asks a court for relief from his folly, in cases of illegal executory contracts, the purpose not having been accomplished, it will be granted, if in granting it the public is not injured, and no dangerous precedent is established.

## CORPORAL PUNISHMENT FOR CRIME.

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L. H. PERKINS.

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"He who would lay bare the mysterious springs of human actions must descend—with a heart at once full of charity and severity, as a brother and as a judge—into the impenetrable casements where crawl in confusion those who bleed and those who strike, those who weep and those who curse, those who fast and those who devour, the wronged and their oppressors."

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In the never ending conflict between moral order and social anarchy who can count the cost of war on crime?

Of all the social problems crime and its prevention are the most insistent and difficult. The evolution of crime should be the subject of a volume. Let it be the ripest product of a master-mind, full of years and experience, and knowledge of the world and men. Then shall we have laid bare the well-springs of the human heart, and discover the motives and follow the paths that lead men to their ruin.

The student of criminal anthropology is amazed at the dullness of the laws and the consequent failure of the courts to reach the root of the evil. It is worse than useless to prescribe punishment without some knowledge of the causes of crime, and of the physical, mental and moral characteristics of the criminal. Hence the general failure of criminal codes, either to deter or to reform. The great majority of legislators are innocent of any knowledge of the subjects on which they legislate. They construct algebraic formulæ: So much crime,

so much punishment. That system has always failed, and deserves to fail.

Before attempting an opinion we must know something of crime and criminals in general and of punishment, its uses and abuses, and the right and duty of the state to punish.

There are various classifications of criminals, such as political, occasional, insane, instinctive, habitual and professional.

Despine regarded the instinctive criminal as a psychological anomaly. Professor Cesare Lombroso first pointed out the physiological abnormalities. He proved by careful tests of weight and measurement in an incredible number of cases, that instinctive criminals are organic anomalies. That there is a physical as well as moral malformation, which results in moral insanity, or better, moral imbecility. In such persons the "psychic retina has become anæsthetic;" they are morally blind. It is now well settled that a person may be morally mad, while the mental faculties exclude the ordinary acceptance of insanity. If a person be morally mad, then the psychologist must tell us how to deal with "the insanity of the sane."

Gall, the father of modern criminal anthropology, declares: "The measure of culpability and the measure of punishment cannot be determined by a study of the illegal act, but only by a study of the individual committing it."

A moral imbecile, such as Thomas Wainwright, the notorious forger and murderer, is wholly indifferent to the rights of others. His every instinct is anti-social. He is the supremest egoist. He desires an end and can see no obstacle to its accomplishment. Brilliant intellectuality is combined with moral blindness. Ethically he is color-blind. He has no power to distinguish right from wrong. He would do all these monstrous things openly, but for the fact that he would be thrown into prison. This is inconvenient, hence he resorts to craft and cunning and deceit and fraud. He has no comprehension of punishment except inconvenience or pain. It serves no useful purpose to punish him. Perhaps, before God,

he is not a criminal, for while crime is the breaking of a human law, sin is the conscious and wilful choice of wrong.

We do not muzzle a mad dog for punishment and turn him loose upon the third day. But there is no more place in society for the moral imbecile than for the mad dog. Surely punishment is not the remedy, and the humanity of the age could not adopt the famous order of Charles IX on St. Bartholomew's Eve, "Kill them all; God will know his own." Nor can we say with Diderot: "The evil doer is one whom we must destroy." He must be restrained, not in anger but in sorrow, for his own sake and for society.

From the instinctive to the habitual criminal is but a step; in fact, they so blend, in the border land, that no line of demarcation is discernable.

The habitual differs from the instinctive criminal in that he knows the difference between right and wrong, and is clearly conscious of his own moral obliquity. Furthermore, the instinctive criminal is such by nature, while the habitual criminal is the product of long years of training in vice and crime. He is the evolution of the occasional criminal, and the highest development of his class becomes the professional criminal.

By what mysterious forces are men led to a life of crime? Heredity, environment, our artificial civilization, and the hard cold hand of destiny are responsible for many a first step in crime.

It is not the child's fault that he is begotten in sin, and brought into the world by vicious, drunken, dissolute parents; that he is regarded from birth as a burden scarcely to be borne; that he never knows the name of love or home; that he knows of God only by the picturesque forms of criminal blasphemy; that from his earliest remembrance he is kicked and cuffed and cursed, not for what he has done but because he is in the way and must be fed; that the very air he breathes is poisoned with the miasma of vice and crime; that his infant mind is taught that every man's hand is against him, and that

the only law is self-preservation. With him there is no conscious first step in crime; no compunction of conscience. Crime is indigenous to him. It is his natural condition.

The first step in crime may be the turning point of the life of a child. In early childhood it may be but a trivial sin, but it will cause the child deep sorrow and remorse. Next time it will be easier. Then may begin a long course of wrongful acts, gradually hardening the heart and blunting the conscience, increasing in gravity as the child grows old, until a breach of the law lands him before the magistrate charged with his first offense.

The "first offense" is not often the first step in crime. Many a crime goes undiscovered. But given a beginning in the course of crime, "How use doth breed a habit in a man."

We need not go back to first principles and inquire by what authority society assumes the right to punish. Suffice it that we were born among those institutions, that they are sustained by the consensus of opinion of all civilized men, and that upon our own intuitions we concede society that right.

Primitive punishment was drastic and spectacular; short, sharp and fatal. It appealed to the physical senses. At first the right was in the private avenger. When transferred to the public the purpose remained the same, vengeance, retribution, an eye for an eye, a tooth for a tooth. The aim was to get rid of the criminal as quickly as possible. Hence the axe, the stake, the gallows. There was no thought of the moral regeneration. The only purpose, in cases not worthy of death, was to inspire in the culprit, and his kind, such fear that they would not dare to offend again.

There is among penologists, a wide difference of opinion as to the true purpose of punishment. One declares that it is retribution. Another that retribution is for sin and not crime and belongs to God. Another that it is to protect society from the criminal and diminish the number of crimes. Another says the supreme object is the reformation.



Jonathan Dymond, in his *Essays on the Principles of Morality*, asks: "Why is the man who commits an offense punished for his act? Is it for his own advantage or that of others or both?" He reaches the conclusion that it is for both, but primarily for his own. We cannot accept the doctrine, except so far as society will be benefitted. The paramount issue is the good of society, and not of the fraternity of rogues. Our first care must be the welfare of the great body of honest, law-abiding citizens, who compose the Commonwealth. The criminal fraternity prey upon society when at large and must be fed and housed by society when in durance. So whether bound or free they live at the public charge and the innocent are taxed to support the guilty. And yet we hear the cry that convict labor must not come in competition with that of the honest son of toil. Was ever fallacy more groundless! If competition hurts, then every man hurts every man who would like to have his job. John Smith, the tailor, while an honest man, supports himself by labor. That robs every other tailor of the chance to make the clothes that Smith makes. When Smith becomes a convict can he do more work and hurt more tailors than he could when he was free? By somebody's labor he must still be housed and clothed and fed. Shall it be his own, or that of society, which he has wronged? Shall his crime exempt him from bearing the burden which his labor ought to bear?

Let us go a step further. Suppose the whole state consisted of ten men, all of equal skill and all dependent on their labor. One becomes a thief and they are forced to lock him up. The same amount of work must still be done. Shall it be done by nine or ten? Shall the nine honest men give of their work to feed and warm the rogue? It matters not that in the real state the public foots the bills. The public funds are raised by taxes, and taxes represent the labor that we contribute to the state. The economic law remains the same. This convict labor competition is a fine frenzy of the politi-

cian's fertile brain. He casts the bait, and the voter, like the mountain trout, strikes at the phantom fly and hooks. How some dogmatic statement, confidently hurled by a self-anointed Moses, will catch the public ear, like a strain of fantastic music, and by constant use become a proverb and delude a generation.

Stated briefly the purposes of government are to protect individual rights and promote the common welfare. This done the less it interferes with men and things the better. Allegiance is the price paid for protection and surrender of one's right to be his own avenger. Hence the state is not alone concerned with the repression of crime and the protection of the citizen. It is its duty to redress the wrong by proper punishment; and whenever the state fails so to do it loosens the bonds of social order.

While it is undesirable to carry out the letter of the *jus talionis*, still it is plain that no abstract philosophy can ever remove from the public mind just indignation for a monstrous crime, and it is well that it is so. Any refinement of the distinction between sin and crime that eliminates justice to the felon, will only increase the demand for summary vengeance. It will not satisfy the public mind that the brute who waylays a beautiful maiden and inflicts on her an outrage worse than death, shall be washed, and groomed and comfortably housed and warmly clad and luxuriously fed and voluminously lectured to the end that he may learn the enormity of his crime. All that is good, but two preliminary operations, that will be suggested at the proper time, will purify his blood, and appeal to his sensibilities, and do more for his repentance, and the suppression of mob violence, than all else that is dreamt of in our philosophy.

Every penologist who has discovered a *sine qua non* of punishment can be driven to insurmountable difficulties by pressing his theory to its logical conclusion. No one of these theories fully answers the question; but in varying degree

they all enter into the true purpose of punishment. It is not wholly a means or wholly an end. It is both a means and an end. If it ceases to be punitive it fails in half its office. If wholly Draconian it will not square with modern notions of humanity. Its highest ends will be attained by a happy combination of expiation and discipline.

The first impulse of every generous man is sympathy for that great body of unfortunates, whose ill star has led them to offend against the law and brought them under the ban of society.

The brutality with which criminals were treated all through the christian era, save the last half hundred years, heightens our sympathy and pricks the awakened public conscience. The revolt against the inhuman brutalities of former years was widespread, embracing every christian land, and so sweeping have been the reforms and so resistless the sentiment in favor of the humane treatment of criminals that some people are inclined to forget the honest, law-abiding remnant of society, upon whom the criminal is a burden and a peril.

There are just and humane people, with a superficial smattering of social science, who wholly miss the mark in their course towards criminals. They lavish compassion on the professional rogue who enjoys the luxury while secretly mocking at their sympathy. There is also a maudlin, sickly sentiment, especially among women, that lionizes the criminal, whose weakest point is often vanity. This misdirected philanthropy is pregnant with irreparable mischief.

Grotius says: "Leniency should be exercised with discernment, otherwise it is a weakness and a scandal."

Max Nordeau goes a step further, and declares: "Toleration and above all admiration of the ego-maniac, is a proof that the kidneys of the social organism do not accomplish their task; that society suffers from Bright's disease."

We who advocate the use of corporal punishment as a safeguard for society offer no apology to misguided philan-

thropy. We defend the *use* not the *abuse* of corporal punishment; and furthermore, be it known, that among those who support this view will be found some of the most merciful, humane, benevolent, kind hearted and broad-minded of men; to whom it would be impossible to impute vengeance or retaliation, much less brutality; philanthropists in the broadest and truest sense, whose sole desire is the betterment of mankind. This school of jurists is keenly alive to the great world movement of reform, and will be found encouraging every method that appeals to the best that is in a man in the hope of turning him from a life of crime.

In its large significance corporal punishment extends far beyond the lash and the whipping post, and comprehends all physical infliction, even the supreme penalty, death. The absurdity of the present law, which condemns a man to be hanged by the neck until he is dead, when everyone, and the felon best of all, knows it is an empty mockery, has been thrust home by recent events. Better far to pronounce a sentence that will command respect.

I am a firm believer in the penalty of death, but the law should be self-executory, and in the absence of executive clemency, the sentence should go into effect. But it is not our purpose to open at this time the discussion of capital punishment, which just now fills so large a place in the public mind. It is an absorbing topic and an hour should be set apart for its consideration at this annual meeting of the bar.

Only murderers have been thought worthy of death and very few murderers belong to the class of confirmed criminals. They are mostly the victims of passion or some morbid or insane impulse.

The theme that especially engages our attention is the treatment of the rogue, the vagabond, the brute, the habitual and professional criminal. In his infinite perversity he violates every law, human and divine. But this new theory of

morals excludes from his punishment every element but reform.

Seneca advised the humane removal of confirmed criminals, without vengeance, in the interests of the peace and welfare of society. But the doctrine is too dangerous to be entrusted to men.

I have lately corresponded with a friend in Delaware, an eminent practitioner of that State, who confirms the reports to the American Bar Association in 1887.

Within the past ten days Chief Justice Lore declares: "In my forty years' experience I am firmly of the opinion that the whipping-post is effective in Delaware." He cites the cases of "Big Frank," "Jimmy" Hope, and other burglars, who were whipped with forty lashes in New Castle jail, and after their release were never again seen in Delaware.

Flogging, in Delaware, is a part of the penalty for a large variety of crimes, and the criminal statistics of that State present a most instructive study, but whether from that cause or from ancestral piety I will not attempt to say.

Maryland has revived the whipping-post, on a strictly limited scale, chiefly for the cruel wife-beater. I have lately learned from private sources that the results reported to the American Bar Association in 1887 are still sustained and bid fair to equal those in England where the crime of garroting was almost blotted out by the judicious exercise of the lash.

The resolution in the American Bar Association which was strongly urged but failed to pass, was this: "Resolved, That, in the opinion of the Association, the interests of society would be promoted by the general use of the whipping-post as a mode of punishment for wife-beating and other assaults on the weak and defenseless, such as assaults committed with sandbags, brass knuckles or similar weapons."

In 1895 there was introduced in the legislature of New York the following bill: "Whenever a male person shall be convicted of a felony consisting in or accompanied by the

infliction of physical pain or suffering upon the person of another, the court wherein such conviction is had, may in its discretion, in addition to the punishment now prescribed by law for such felony, direct the infliction of corporal punishment upon such convict. The sentence shall specify the number of strokes or lashes, which shall not exceed forty in number, to be laid upon the bare back of the convict within a time specified, by means of a whip or lash of suitable proportions and strength for the purpose. Such corporal punishment shall be inflicted by a keeper or other officer of the prison to be designated by the warden, within the prison enclosure, and in the presence of said warden and of a duly licensed physician or surgeon, but in the presence of no other person; and the physician or surgeon within thirty days thereafter shall certify in writing the fact of the infliction to the court imposing the sentence."

The purpose of this bill, which met with strong support but failed, was not to substitute corporal punishment for any part of the imprisonment, but, in the discretion of the trial court, to add it to the penalty already fixed. It could profitably be extended to certain misdemeanors, where it should be a substitute for imprisonment in jail. Then the whole case of vagabondage would take a change of venue. The professional "vag" has a fine sense of humor, and knows more of the law of his case than his attorney. He would smile a cold, dry smile at the thought of being caught in a state where the court had jurisdiction of a cowhide.

Lord Coke observes: "There are crimes that are not so much as to be named among christians." Under a general provision like that proposed in New York, they would all fall within the limit of the lash.

It is difficult for us in Kansas to believe that certain crimes exist; crimes against nature, practiced by force upon defenseless childhood, as disclosed in the criminal records of great cities, but there is one crime in Kansas that we have learned

to know. It ought not to be named, much less permitted in a christian land. The crime, and its fit punishment, can scarcely be discussed; but how else can it be expunged? Shall it be by fire? Must he who writes the story of this new born age, still further shock the world and foul the fair name of America, by pictures of a howling mob, profaning every law of God and man; with every bulwark of our rights thrown down, the gates of Hell unchained, and passion, loose, unbridled as hurricane, roaring above the prostrate guardians of the peace, annihilating in an hour the civilization of six thousand years?

Death in flames! Savage, bloodthirsty vengeance! Three things this savory orgy lacks: salt and sweet herbs and a good appetite.

There is a law that in the last extremity, in the presence of impending death, all barriers are removed, all ranks are leveled, all rights are equalized. Supreme necessity is supreme law. Can it be possible that some such overmastering impulse, at times dethrones the public mind, and, while the fit is on, the latent cannibal runs riot in the land? It seems it must be so; and, if it be, 'twill be, until we rise to the necessity.

We may excoriate the cannibal but which of us will now affirm the provocation is not great? Poor, helpless woman! Why don't she learn to shoot? This monstrous crime pursues her like a nightmare. It is an ever present peril to every woman in the land. Must she shun every alley and fly from every bush lest lascivious eyes be on her and unbridled, brutal passion block her way? Of all the hobgoblins abroad in the night, in fact or fancy, or in song or story, there is none so hideous as the stealthy form of the lecherous brute that leaps forth out of the darkness and drags defenseless woman to her ruin.

And can it be that we who make the laws; we who have wives and daughters and sisters and mothers who are dearer than life itself; we who honor woman, not for her strength

but for the very attributes that render her the prey of force; can it be that we can make no laws that will protect her, or satisfy the public that justice will be done?

Let us see.

Concede, that in the sight of God and man, the crime of rape is worse than murder, yet is it plain that the punishment should be death? In the interests of woman herself were it not better that the brutal ravisher have somewhat more to fear if he do also murder? Else would not the motive to silence forever the most dangerous witness be complete?

I offer the suggestion of three degrees for rape. The first to cover only ravishment by brutal violence and force; the second all the intermediate grades save statutory rape, which alone shall constitute the third degree. I am no firm believer in the justice of our age of consent, and would leave corporal punishment for statutory rape to the discretion of the trial court. The terms of imprisonment as now prescribed are doubtless long enough, but let us add to them the sting and shame of the ancient whipping-post. For the third degree, in the court's discretion, not more than seven lashes. For the second degree two floggings of twenty lashes each, soundly administered within twelve months. And for the first degree, three several floggings of forty lashes each within twelve months, and then castration. There is much reason in this ancient penalty and the time has come when it should be revived. If, as some say, this morbid and unbridled passion is disease, then treat it like appendicitis, remove the cause.

It was long ago decided by the highest court of one New England state that it did not fall within the inhibition of cruel punishments. It is not cruel. This is the one crime for which the *jus talionis* is the only proper punishment. This is the one punishment that will deter. It is the one that will satisfy the public mind.

Given, a reasonable assurance of its prompt infliction, and add to it the lash, and three things are sure: This one



offender will so offend no more; the law will take its course, with no infraction by impatient mobs; and the fear of a like visitation will deter more evil-minded men than burning at the stake, or eternal torment in Hell fire.

In the endless war with crime society is not alone concerned with the great felon. A hundred different kinds of petty crime consume the time of all our city courts. And for all such no punishment remains save the futile fine and common jail. Our whole system of county jails is rotten to the core. It is a blot upon our civilization. It cannot be reformed. The only hope is in annihilation. More than seventy years ago De Tocquerville called our county jails "the worst prisons he had ever seen," and they are little better now. The jail is frequently a welcome refuge and comfortable lodge. Here are kindred spirits, and meat, drink and shelter without work. The moral atmosphere reeks with contagion. It is a moral pest-house from which issue the germs of loathsome disease that infect the body politic. It is the trysting place for all the disturbers of the night. Every lesson taught within its walls is anti-social; contempt for authority and plots against the law.

We learned upon our mother's knee that: "Satan finds some mischief still for idle hands to do," and yet we offer idleness, crime's mother, as an antidote for crime. There is a duty resting on society which it has no right to dodge to save expense. It has no right to mingle in a common den the hardened felon and the petty thief; the old offender and the youth who may not yet be settled in a life of crime. The time will come when the state must furnish a proper place for the confinement of all convicted criminals, whether the offense be great or small. Then the county jail, not overflowing with an heterogeneous mob, can fill its proper office as a prison of detention, and, if constructed upon scientific plans of separation, will prevent contamination and protect the man who may be innocent from contact with the rogue.

Our modern costly prison, clean, light and airy, full of good food, good beds, good clothes, and just enough well modulated exercise to keep the liver active and the bowels open, is not so bad for one whose friends and companions are all frequenters of the place. He feels no greater shame on going there than a well fed steer on going to pasture. Doubtless the steer would prefer the pasture without the fence. But the other steers have also to abide the fence. Happiness and contentment are relative terms. The steer is not unhappy because he cannot fly with the bird. He measures ropes with the other steer.

There is of late world-wide activity in the effort to diminish crime, and it would be immensely to the interest of society to lesson the number of jail commitments and sentences to prison, and this is the plain proposition: Does the present kind of punishment deter the man who takes to crime for a profession? Criminal records abound with the history of the same offender, in different places and under various names, plying ever the same old trade, taking his punishment as a matter of course, with the same equanimity as a laborer his daily toil.

In gathering statistics from many different countries for a number of years, I have had to forego many preconceived ideas on criminal sociology. I am indebted to Judge McAuley and Judge Walls of Kansas City, for placing at my disposal the vast fund of information that their offices afford. Since the 16th day of last April Judge McAuley has sentenced to fine or the workhouse five thousand seven hundred and eighty-nine thieves, vagrants and wife-beaters. Fancy a single court turning out an aromatic grist of eight-and-twenty jail birds on a daily average for nine consecutive months. Among them are not a few who regularly return and spend more than half their time recuperating at the cost of honest people. What use is imprisonment for them unless it be for life?

While the laws of Missouri do not provide the whipping post, both Walls and McAuley have found the means to test the birch as a substitute for the workhouse for young boys. Judge Walls informs me he has tried its virtue in nine cases and not one of them has ever come before him a second time. He thinks the results are excellent, because the boys cannot return to their gamin friends and brag of having been in jail, but must avoid their old associates to escape their ridicule and gibes. On the other hand that sending boys to jail is not such punishment as will cause them to desist, as shown by many instances of boys sentenced in his court for petty crimes, now serving terms for felony.

A thrice convicted criminal is a constant peril to society. He knows and does not fear the worst, for what a man is used to he no longer dreads. A third conviction for a felony should always be for life, or until a perfect cure is certified by competent authority; but for petty crimes some system of cumulative punishment that appeals to the physical sensibilities is the only thing that will deter.

In the Criminal Returns from England and Wales it is reported that in Lancashire, the West Riding of Yorkshire and Staffordshire, about seventy per cent of the prisoners were known to have been previously convicted of crime; and in the great cities of Liverpool, Birmingham and Bradford the proposition reached the enormous figure of seventy-nine per cent. Does a system that deters but one man in four from a repetition of his crime serve any useful purpose for which punishment was ordained?

Among many hundreds I call to mind four instances reported by the Secretary of the Howard Society, in London: For cruel wife-beating one man was brought before the English Court twenty-seven times. For luring little girls to lonely places to commit a beastly outrage, one was up for two-and-twenty times. Another kicked his wife and child with hob-nailed shoes until he quite disfigured them, and even broke

their bones. The fourth assaulted inoffensive persons with crowbars, clubs and knives and gouged out people's eyes.

Will our sentimental friends, wholly bent on reformation, regard only such frightful miscreants, and have no thought for the innocent who suffer at their hands? Better far to say with Judge Baldwin, of Connecticut, "Society needs saving from the criminal quite as much as the criminal needs saving from sin."

Public sentiment is like a pendulum, it swings to the full limit, and then reverses just in time to avert a great calamity. Early in the last century the social crimes against the criminal began to be denounced by philanthropists, like Howard, and at last the public conscience was roused. Step by step, every time-honored punishment was overthrown, and in the main this was righteous and just. But having swept away traditions we were on untried ground. The prison as a place for the punishment of condemned criminals is a modern institution, and its gradual displacement of every other form of punishment is justly viewed with alarm by some of the wisest and best of men. There is a widespread awakening to the fact that we have gone too far. We have carried our reforms to such a pass that the convict is better housed, better fed and better clad than when he is at large, or than many a man who lives by honest toil and is taxed for his support.

As one great object of punishment is to deter and so protect society from crime, we must make the conditions such as to be shunned, not courted, by the criminal class. We have a law already for breaking out of jail; but what we need is one for breaking into jail, in winter to avoid the cold, in summer to avoid the heat, and always to avoid the need of work, while feeding at the public charge.

The professional rogue, who represents the aristocracy of crime, knows by experience that he will now and then be caught. He takes his medicine with resignation and goes through the same round time after time with equanimity. He

knows the worst and thinks the game is worth the candle. He is familiar with many prisons and compares them as the errant knight of the grip compares hotels. He knows which are the best and, for good cause shown, he does not tarry long in Delaware. Even Elmira, one prison among a thousand, and Brockway, one warden among ten thousand, cannot reform him. He is incorrigible and more. He has a genius for not being reformed. By the system of definite terms of imprisonment, we turn loose upon society, at more or less regular intervals, a person who has deliberately chosen a life of crime and means not to forego it, but on the contrary to lay fresh plans to prey upon society while comfortably housed and fed at its expense.

If the punishment that is sufficient for the man of ordinary instincts, will neither reform, nor protect society from a certain class of culprits, is there any sound reason for not adopting some punishment that will avail?

It is urged that the lash degrades both him who gives and him who takes it; that it is cruel, brutal, barbarous; that it depraves the public conscience; that it is a relic of the dark ages; that it flourished along with the rack, and all other savage forms of torture and mutilation; that with them it failed and was discarded; that it never served a useful purpose, even to deter; that to revive it would be to reverse the onward march of civilization.

It would not be fair to the great body of honest men who hold these views, to say that there is no ground for any part of the arraignment. But let us test it at a point or two and see if it will stand the test.

They say the lash degrades; but does the *punishment* or the *crime* degrade? We do not advocate the reinstatement of the lash, in the savage cruelty of other days, when the flesh was cut in ribbons by the cruel cat-o'-nine-tails, but reasonable castigation with a rod or strap intended only to produce sharp pain, but no laceration of the flesh or skin; nor do we advo-

cate the lash at all for the man of refined instincts and sensitive soul. To him the prison brand will bring far keener torture than can be done upon his body. For him the prison is punishment enough.

But let us take an illustration: Suppose two men; one educated, sensitive, refined, never in prison nor familiar with crime; the other a hardened criminal and companion of criminals from his youth, who has tasted all that modern sentimentalism has in store for the worst that he can do. Will imprisonment punish them in the same degree? For one the whole purpose of punishment is attained; for the other it is chiefly lost.

This paper will be written to no purpose if it fails to show that punishment must be leveled at the criminal and not at the crime.

But, granting that the lash degrades, what better argument for its adoption? There are grades and casts and ranks among criminals, and while they care not for the opinion of society, with which they are at war, they are keenly alive to the good opinion of their pals. So if the brute, whom the prison cannot shame, lose cast with his companions because of being whipped, is it not a great point gained? There is no brute so hardened that he does not fear the lash. It conveys an argument that he can understand. It does deter, for the wretch is rarely flogged a second time and almost never thrice, while thousands go to prison twice, thrice, ten times and more for substantially the same offense.

If the lash is a relic of barbarism so are the crimes for which it is preserved. Eradicate the crimes and no one will defend the lash. If it is brutal, it is reserved for brutes, who are not amenable to gentler treatment. What terror has imprisonment for wretches such as these? But they are cowards all, and would cringe at the mere thought of their own pain. Sometimes the interests of society demand that force be met by force. Then "the sting of the lash is the

strength of the law." If nothing else will meet the sentimental argument that the lash degrades, investigate the monstrous crimes reported in a hundred courts, and then declare if any depth of degradation is reserved for those who practice them.

It must not be inferred that we disparage aught that can be done for criminal reformation; but the limits of a paper such as this exclude the possibility of even touching on that theme except so far as it may overlap the one that we are now discussing. That they do overlap is very plain. It matters little what motive does restrain from crime, if it be lasting. Surely fear appeals to the lowest impulse of the human heart, but there is force in the philosophy, "Assume a virtue if you have it not," and use becomes a habit. There is some hope of reformation of the man who quits the path of vice however base his motive. But corporal punishment is not devoid of use in reformation, and to this doctrine I am pleased to add the mighty weight of Brockway, founder and maker of the greatest reformatory in all the world, the one that served as model for our own. After more than twenty years of enlightened christian trial and experiment with all the most approved and humane methods for the reformation of selected criminals, for such were given him at Elmira, he concludes in his last report that even among such there is a class of recalcitrants that is amenable to physical treatment alone; and that of all the means available spanking is the safest, surest and best. He adds: "Conferred authority to use this means, shown by occasional application of it, greatly reduces the number of occasions when physical treatment is needed." There is great force in the suggestion that what a man becomes used to he ceases to dread, and men can become wont to pain as well as dead to shame; but the dread of something yet untried will deter many a man from crime. Hence perhaps there is more virtue in the menace than in the application of the lash. Perhaps for petty crime the best deter-

rent would be a sentence to be flogged, but the same to be deferred until the culprit shall offend again. Thus, as with the indeterminate sentence, he would hold his fate in his own hands. Let this sentence to the lash hang over him to be inflicted with fresh punishment for his next offense. But if he walk within the law for seven years let the penalty expire by limitation. An ounce of prevention of crime is worth a pound of cure.

General Brinkerhoff has wisely said: "The lessening of crime in a country is an object worthy of the best thoughts and the best efforts of our best men." Crime is an ever present menace to the peace and order of society. It will never be eradicated until the final holocaust. Our fathers waged a war of extermination with no perceptible effect, and we have drifted to the other pole and sought to reclaim the thug and cutthroat by loving kindness in a Home for rogues in temporary retirement. We too have failed. So far from crime decreasing the statistics of the world show quite the contrary.

If brutal men will trample under foot the closest ties of blood, outrage the holiest instincts of humanity, and bring unutterable misery and shame on those who should deserve their tenderest care, before high Heaven they do deserve such chastisement as will appeal to their dull faculties, and, failing all things else, it may be that the lash, revived in christian hands, in this new century, may prove an instrument of mercy.

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[EXPLANATORY LETTER FROM MR. MASON.]

Garden City, March 26, 1901.

*D. A. Valentine, Secretary, Topeka, Kan.*

Dear Sir: I find that I have hopelessly lost what memoranda I had as a basis of comments upon the paper of Mr. Perkins, read at the meeting of the Bar Association, and especially as I quoted from magazine articles which are also mislaid, I conclude that I cannot well attempt to reconstruct my remarks for publication.

Yours truly,

H. F. MASON.



## JOHN MARSHALL.

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H. C. SLUSS.

The occasion of the present meeting is unique in the history of the world. We celebrate the Centennial Anniversary of the appointment of a man to the office of a judge. Throughout the whole of our country the people are engaging in the same service. No other such event was ever commemorated.

In front of our National Capitol in the Capital City, there has been placed a statue representing the man in the sitting posture of a judge upon the Bench, delivering the opinion of the Court. It was placed there by the joint action of the Congress and the Bar of the United States to serve as an enduring memento of the gratitude of our people for the services of the judge to our country as the expounder of its constitution.

No such memorial was ever elsewhere erected to commemorate such services. These testimonials, given at such distance of time, and amid the clangor of this busy age, indicate in the plainest way the deep and enduring impression which the judicial work of John Marshall has made upon the institutions of our country and the energizing uplift it has given to the material power of the nation and the moral power of the people.

In the seventh of Cranch in a footnote at the beginning of a term of the Supreme Court, is this statement: "February 3d, 1812, Present, Washington, Livingston, Todd, Duvall, Story, justices. The Chief Justice did not attend until Thurs-

day, February 13th. He was injured by the oversetting of the stage coach on his journey from Richmond."

This is a statement of a not important fact in itself, but how vividly it suggests to the mind a picture of the time of Marshall's coming to the Supreme Bench one hundred years ago; and the contrast between the condition of our country then and now; a contrast which no pen or tongue can adequately describe.

Then there were sixteen states, having a population of less than six millions. It was a time of the whipping-post, the branding iron, and imprisonment for debt. It was a time of dirt roads, of stage coach and horseback travel, and of freighting by the Conestoga wagon. The steamboat had not yet come to stay, and the turnpike road was receiving its first attention.

A written constitution had been adopted, but no two people seemed to understand it alike; and even many of its leading framers, advocates and defenders, differed diametrically as to its fundamental theory.

A national government had been set up and organized, but an old inherited habit of state pride held dominant sway over the minds of the great majority of the people. State lines, like barbed wire fences, held the people fenced off to themselves in a condition of state isolation, so that there was no cohesive force between the different parts of the country; no unity of feeling, no national impulse, no national public sentiment.

But how the heart is thrilled with patriotic pride, when we turn from the picture of those old days and contemplate the condition of our country today as it goes careering to its destiny of the primacy of the world.

We face the problems and enter upon the task of the new century blessed with the possession of the two masterful elements of success:—The material power of a great nation, and the moral power of a united people.

Our resources of the mine, of the forest and of the field have been vastly developed and utilized, and limitless stores of all these still remain untouched.

Within ourselves we are able to furnish our own people with remunerative employment, with food, raiment and shelter, and with protection to life and property against all the world.

Within ourselves we, as if by magic, assemble and equip armies and put them to field; organize and armor navies and put them to sea; rescue the oppressed from the tyranny of Kings, and establish our flag half way 'round the globe.

The school house and its school is brought to every doorstep; the daily paper, seething hot with the latest pulsation of the world's great heart, is brought to every hamlet; the railroad, the telegraph and the express, seek out every work; and every second of every day, millions tons of the products of our own mines, mills, farms and factories are kept flying, as upon the wings of the wind, not only to and from every part of our own land, but outward into every known land and clime.

Instead of Newgate prisons, we have reformatories, refuge homes, asylums, hospitals, free libraries and associated charities everywhere.

Who shall account for this wonderful change, and explain the marvelous development a century has brought about? Many great forces and influences have entered in and performed their office. Here was a grand opportunity for an onward sweep of civilization. The world and the time were ripe for great things. But what shall we say was the central leading force, the pre-eminent fact which has formed the basis for this advancement in our material greatness, which the century has witnessed?

I believe it will be conceded by all practical minds that our system of commerce, and especially of our internal or inter-

state commerce, stands as the pre-eminent and most potent factor contributing to this result.

From what small beginnings, and to what wonderful proportions has that commerce proceeded. And just as our internal commerce has grown and flourished, so has our country moved upward in material strength and moral grandeur. With it there is activity and life; without it there is stagnation and decay.

Its effect has been to bring the man of Maine and the man of Oregon into close fellowship as neighbors, friends and co-workers. It has promoted unity of interest, unity of purpose, unity of patriotism; and has aided mightily in the growth among us of a National Public Sentiment whose decrees are swift, sure and just; and by the operation of which, notwithstanding we have in form a Federal Republic, we have in substance all that is beneficial in a pure democracy.

Many things were of vital importance to the development of our internal commerce to the point of its present magnitude. The first of these was that it should be unfettered and free. That no state, nor agency of a state, should be permitted to obstruct it, or hamper or burden it, by the imposition of burdens or restrictions. Its very life was involved in its freedom from state interference.

It was claimed that the power to regulate commerce between states existed in the states concurrently with Congress; further, that the power to regulate such commerce, as vested in Congress, was limited to the matter of articles of traffic; and that the instrumentalities of carrying it on, the great highways of it, in so far as they lay within a state, were subject to the control of that state.

But when this great question came up to Chief Justice Marshall, how grandly he cleared the field. By his decision he settled it, that the power to regulate inter-state commerce was vested exclusively in Congress; that this power went, not only to the matter of articles of traffic, but to all instrumental-

ities by which commerce is carried on, including the highways and vehicles on which it is conveyed. He further gave to commerce a comprehensive significance, applicable, in its ultimate analysis, to all forms of transportation, travel and communication.

To the successful upbuilding of this commerce it was also necessary that a currency be provided, stable in quality, convenient in form and flexible in volume, sufficient to effect all desired exchanges. This, Congress undertook to do by the establishment of National banks with power to provide such a currency. To reach its highest utility, and accomplish the purpose for which it was designed, it was equally essential that this system of banking and currency should be free from state interference. But it was claimed that Congress had no power to create a National banking system, or authorize such a currency; and that the states might tax it out of existence.

This great question coming up to Marshall for decision, he cleared the field of that dangerous obstruction, and settled it that Congress had power to create National banks, and through them furnish the people a paper currency for all the needs of Commerce. And then and there he laid the foundation on which Congress, in after years, was enabled to provide the sinews which preserved the life of the nation.

To meet the demands of a growing commerce, our unrivalled system of railroads has been created and brought to its present state of perfection. Without these who cares to conjecture what our condition as a people and our position as a nation would be today? This tremendous enginery of civilization never would have been provided, except by the great aggregation of capital through the instrumentality of corporate organization. Such corporate organization, adequate to enterprises of such vast magnitude, never could have been secured, except upon faith of absolute certainty that a corporate charter meant the investiture of an inviolable legal right. But it was claimed, that a corporation, being created

by a charter granted by a state, was simply an instrumentality and agent of the state to carry forward its own state policy; and that the management of the powers delegated to the corporation might at any time be assumed by the state itself.

This great question also came up to Marshall for settlement, and he settled it by a decision that the grant of a corporate charter, where property interests are involved, is the vesting of an inviolable contract right, which is beyond the reach of legislature to destroy or to impair. And he then and there laid the foundation of the most marvelous advance in productive enterprise the world has ever witnessed.

The United States could not have reached its present position of population, wealth and strength, without the power to acquire additional territory. But it was claimed, that the general government was without power under the Constitution to acquire territory.

Jefferson, who as President negotiated the great Louisiana Purchase, declared that his action in that transaction was unconstitutional. This question in course of time coming up to Marshall for decision, he established the broad doctrine that the government had certain inherent powers of sovereignty. That it had power to make war and peace; and to enter into treaties; and necessarily had power to acquire additional territory, either by conquest or treaty. And soon thereafter the panorama of our national domain unrolled to the Pacific ocean.

But underlying all these contentions, kept to the front during all the progress of these various controversies, constituting the pivotal center around which they all revolved, and overshadowing all in the peril it threatened to the structure of our government and the permanency of our institutions, was that bolder and deeper contention, that notwithstanding the Constitution was the supreme law, and each state subject to it, yet that each state was sovereign within itself, and had never surrendered the right to construe the Constitution for

itself; and under the sanctity of its character of sovereign state could determine for itself the measure of its duty and the limits of its own powers as well as those of the general government; and could apply a corrective to unconstitutional action of the government, even to the extent of withdrawal from the Union, whenever it deemed its rights invaded.

This great question of questions came up to Marshall to be determined, in so far as judicial decision could determine such a question.

In a series of decisions, which, for luminous statement, cogency of reasoning and unanswerable demonstration, stand unrivalled in all the realm of judicial literature, Marshall made it clear that the United States is a nation of people, and not a nation of states; that within the sphere of the powers conferred it is supreme; that it is the sole judge of the extent of its own powers; that it has, as part of its organization, a department and a tribunal whose province and duty it is to construe for the nation its own Constitution, and its laws and treaties made thereunder; that this department is the judicial power of the nation; that no part of this power can be exercised by the states, nor can the states lawfully resist the execution of the laws of the nation so interpreted.

But, although the Court could finally construe the Constitution and pronounce its judgment, yet in cases involving great fundamental questions such as these, the Court was powerless to enforce its own judgments. It could furnish to Webster the broad pedestal from which he could hurl the lightning of his time-enduring oration. It could inspire freedom's mighty host with the conviction, sure as the foundations of faith, that their home was a nation capable of self preservation; yet it remained with the people to enforce the judgment. Said Marshall, "The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme irresistible power to make and unmake, resides only in the whole body of the

people; not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated the power of repelling it."

Solemn, glorious judgment! Solemn, awful warning! And when in the fullness of time, after four years of bloody strife, our renowned chief deputy, Grant, with his posse in blue, acting under our immortal high sheriff, Lincoln, took into his custody the goods, chattels and effects of the late lamented Confederacy, and forever abated the nuisance state sovereignty, he executed final process on the judgment rendered by Marshall.

The appointment of John Marshall to be Chief Justice, coming at the particular juncture of affairs in which it was made, was so opportune as to seem to have been providential.

Only two years prior, what was known as the resolutions of '98 were adopted by the legislatures of two states; declaring that the United States government was created by a compact between the states; that it was not made the exclusive or final judge of the powers delegated to it; that each party to the compact, the government and the state, had an equal right to judge for itself, as well whether there had been an infraction of the Constitution, as of the mode and manner of redress therefor.

Thomas Jefferson, who drafted and inspired the adoption of these resolutions, was to become president at the end of a month.

It is certain that if the then existing vacancy had not been filled during that interval, Marshall could not have been appointed, nor could any man holding to his theory of the Constitution; but that some man holding to the doctrine of state sovereignty and strict construction of the Constitution, would have been appointed.

If it were possible to do so, it would prove an unprofitable service to attempt to lift the veil and penetrate the mystery of



what might have been, if it had fallen to Thomas Jefferson to make that appointment.

The heart is sufficiently stirred by the contemplation of the things we see and know. We know that John Marshall became Chief Justice. We know that our nation has been preserved, and our country grandly lifted up. We know that the theory of the Constitution and national character of the government for which as Chief Justice he so firmly stood, has prevailed. We know that the constitutional judgments which he delivered were so armed in truth, so fortified in right, that local self interest, political rancor and rebellious war have not prevailed against them.

We know that the rule of our government, energized by the principles which he judicially established, has been benignant, humane, just and inspiring. We know that beneath the ægis of its protecting wings, there has been brought together and nurtured, assimilated and solidified, a free, happy, advancing, aggressive, irresistible American people.

We know that it was the splendid spirit of Americanism, incarnate in the constitutional judgments of the Chief Justice, John Marshall, that gave to the great white stone of our commercial greatness, hewn from the firm fixed adamant of our nationality, its original impulse; and kept it rolling with the course of Empire, across the stored-up treasures of the Alleghanies; across the wide reaching garden of the Mississippi; across the mineral riches of the Rockies and the gold laden ledges of the Sierras; down the vine clad slopes of the Pacific; until now it has reached the shores of the China Sea, where, luminous with the light of Liberty, Justice, Peace, it keeps watch and ward over the land of the Celestials.

Our America erects no Pantheon of marble and bronze consecrated to its heroes, statesmen and sages. The great deeds of these are left to be inscribed upon the hearts of the generations, as they follow one after another.

In this bright temple of our veneration, inscribed high over

all others for the service they have rendered to our institutions, we read the names, Washington, the Founder; Marshall, the Finisher; Lincoln, the Preserver.

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## THE EARLY DAYS OF MARSHALL.

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JOHN D. MILLIKEN.

*Mr. President, Members of the Bar Association, Ladies and Gentlemen:*

When the committee, having in charge these exercises, honored me with a place upon the program, celebrating the centennial anniversary of the elevation of John Marshall to the most exalted position in the profession, it gave me unalloyed pleasure and undisguised satisfaction. But when I was limited to a discussion of his "Early Days," it seemed that my subject was but incidental and subordinate to the greater theme of that brilliant professional career, that grand and spotless official life, that perfected and finished character which has stood the test of three-fourths of a century in the calcium glare of the world's greatest enlightenment. A test in which not only the man, the patriot, the historian, the statesman, and the judge have been scrutinized, but the great principles which he revealed, announced and maintained, have been sounded with the deep plummet of philosophy, tried in the heated crucibles of patriotism, weighed in the exacting balances of justice, tested by the fierce wager of battle, analyzed by sober reason, judged by the unfailing light of experience, vindicated by *all* of these and stamped with the hearty approbation of the world. So, on an occasion like this (at a time when) when at this very hour, millions of his grateful countrymen, including thousands of that noble profession, which he so richly adorned, are fairly exhausting the language

in their desire to give expression of their love and admiration for this man and his works—to limit one to that period when his life was to the world uneventful and uninteresting, is like clipping the eagle's wings and confining him to the narrow horizon of earth, when he would soar to the heights of heaven, and with a sweep of his vision, behold all the beauties and grandeur of the world.

A little reflection, however, dissipates the thought that the theme is wholly barren or devoid of interest, for, however unpropitious our early environments, who of us does not look back to the innocence of childhood, to the dreams of youth, to the hopeful aspirations of early manhood with inexpressible pleasure and satisfaction, with a feeling that if the eloquent speeches which in our imagination fell from our lips; the sublime poetry we penned; the dizzy heights of fame to which we climbed; the felicitous joys of our affectional natures which we anticipated; the love and esteem of the good and great which we hoped to merit and receive; the visions of grand and noble lives which flashed across our visions; the applause of the multitude for heroic deeds of martial valor, of which we were confident of bestowal—that if none of these had thrilled our hearts and made us hopeful and joyous, life would be deprived of its greatest blessings and its sweetest joys.

So, we might plausibly, and even truthfully, maintain that the part assigned us, if not the most instructive and entertaining, is the most important in the career of him whose life we commemorate, for, as the foundation is to the superstructure of material buildings, so is the early life and training to the more important and enduring edifice of mind and character.

In the childhood days of John Marshall, unless they were unobserved or unrecorded, there appears to have been fewer facts of interest than of most persons who have attained eminence among their fellows. In looking up his biography, we are impressed with the meagreness of information about

his mother, and the extended statements of his father's abilities, accomplishments, and doings.

The sum and substance of the story of his mother is that her maiden name was Mary Keith, a distant relative of the celebrated family of Randolph; that she was the wife of Col. Thomas Marshall, and the mother of fifteen children, of whom John was the eldest.

But the woman who could give to the world a John Marshall, with his strong intellect, his quickened conscience, his well balanced mind, his physical constitution that sustained him for nearly four score years, under the exacting conditions of public life, is no ordinary personage. It does not dim the lustre of his name if we recognize the infallible laws of heredity and give due credit and prominence to her who first conceived the sublime thoughts and thereby laid deep the foundations for the great mind and noble character through which they found expression, and by which she blessed the world and immortalized the name of Marshall.

It is difficult to draw a pen picture of Marshall, the boy, the soldier, the man, or the distinguished jurist, without contradiction so apparent as to impair its integrity. It is said that "his rare gifts, his extraordinary character, was the result of a peculiar interblending of many opposites—its power lay in the combination." He was averse to every form of notoriety, yet held office all his life; profound in philosophy, he was full of sly, waggish humor, genial, and even convivial; a broad scholar, yet he studied only the elementary principles of the school books.

Marshall, the youth, was not prepossessing; his demeanor was not graceful, his appearance attractive or his dress ornate. His chief characteristics, which never failed him through his long and eventful life, were a strong, comprehensive mentality, a strict conscientiousness, great sincerity, and an utter indifference and unconcern to all things which did not involve these dominant traits. At the age of twenty-eight he was

married, and there is nothing in his life that more strongly illustrates the unrestrained sway which he gave to the prominent faculties of his mind, than his beautiful conjugal life. The reciprocal constancy, the ever increasing affection and admiration of Marshall and his wife for each other for more than half a century, produced the most gratifying and satisfactory object of the affectional nature, that divine attribute, perfected love.

A kinsman, who was present, when young Marshall, at the age of nineteen was collecting his company for the war, thus describes him: "He was about six feet high, straight and rather slender, of dark complexion, showing little, if any, rosy red, yet good health, the outline of the face nearly a circle, and within that, eyes dark to blackness, strong and penetrating, beaming with intelligence and good nature, an upright forehead rather low, was terminated in a horizontal line by a mass of raven black hair of unusual thickness and strength; the features of the face were in harmony with this outline, and the temples fully developed. The result of this combination was interesting and very agreeable. The body and limbs indicated agility, rather than strength, in which, however, he was by no means deficient. He wore a purple or pale blue hunting shirt and trousers of the same material fringed with white. A round black hat, mounted with buck-tails for a cockade, crowned the figure, and the man."

He was kind, courteous, chivalric, and notwithstanding a will so strong as to dominate the greatest minds in after life, he was so obedient and submissive, that it is said he never once displeased his father.

The conditions with which young Marshall was surrounded were the most propitious for the fullest development of all his powers of body and mind. His home was in the healthful mountainous regions of Virginia, far removed from the immoral and seductive influences of urban life. His father, a friend and companion of George Washington, a colonel in the

Revolutionary war, had descended from a long line of ancestry who had left their impress upon the ages in which they lived. It is manifest that young John was thoroughly disciplined mentally, morally and physically, and was especially taught the lesson of obedience which is the foundation for self control, without which none can be truly great.

The times, the relation of the colonies to the mother country, the position, character and ability of his father, the place in which they lived, were exceedingly favorable to the fullest development of all the faculties and especially of sentiments of patriotism.

His father, appreciating the advantages of education and culture, seems to have utilized everything available in the interest of his son. The rector of his parish, and later, a private tutor, were employed; at fourteen, he was a student in Westmoreland Academy, and soon after in William and Mary College, and from childhood a reveller in the sublime beauties of nature. All these were supplemented by the active personal assistance of a father, himself a man of sense and culture, who doubtless indulged the hope of the great future awaiting, and possibly, with a prophetic vision, foresaw the immortal name which his son would carve in the niche of fame. With these advantages and time and opportunity to digest and assimilate what he absorbed, no wonder that the marvellous mind was, at the age of twelve years, contemplating the profound philosophy of Pope's Essay on Man. Realizing in some degree the sublime thought of that masterpiece, that—

"All are but parts of one stupendous whole  
Whose body is, and God the soul."

\*   \*   \*   \*   \*   \*   \*

"To Him, no high, no low, no great, no small;  
He fills, He bounds, connects and equals all."

And like that author doubtless he felt that—

"As yet a child, and all unknown to fame,  
I slipped in numbers, and the numbers came."

With all these presented to a mentality approaching genius, the boy was still a dreamer. He seems not to have been wholly occupied by them, but was beholding and contemplating the vista of the future above and beyond these things which were pressed upon his physical senses. Such was his life, until at the age of nineteen, his heart aglow with the fire of patriotism, his warm blood pulsating in every artery, his spirits bouyant with youthful vigor, his conscience demanding and his judgment approving a redress of the wrongs heaped upon the colonies by Britain, he became a soldier in the war for the independence of those colonies, which in a little more than a century, have developed into the greatest and best government known to human history—the marvel of the world and admiration of every loyal member of the Republic.

His superiority of mind, his integrity, his social standing, his knowledge of the world, and his experience as a militiaman naturally caused his selection as an officer, and he was made a lieutenant. He was a faithful and courageous soldier, who rose to the rank of captain, participated in the memorable battles of Brandywine, Germantown, Monmouth and others, and shared the hardships and sufferings of his comrades at Valley Forge with unvarying good humor and hopefulness. He acted much as judge advocate, and his judicial temperament attracted the attention of Commander in Chief Washington. He was sent to Virginia to take command of a corps about to be raised, but the project failed. On foot and alone, returning to headquarters, he was refused admittance to a Philadelphia hotel because of his shabby appearance, a fault that seems never to have entirely left him.

While awaiting the action of the legislature in raising troops, he returned to William and Mary College, attended lectures of the celebrated Bishop Madison on natural philosophy and of Chancellor Wythe on law, and was soon afterwards licensed to practice. A year later, he resigned his commission in the army and began the duties of his profession.

He had served his country for four years, sharing in the victories of Washington, Lafayette, "Mad Anthony Wayne" and other historic men, whose names are dear to us all.

His military record was sufficient to entitle him to a place in American history, had not his judicial character so greatly overshadowed it. The year following he was elected to the legislature from his native county of Fauquier, and the same year was appointed one of the council of state. The next he removed to Richmond, but such was the esteem in which he was held, that, though no longer a resident, he was reelected to the legislature from his former home, and later sat as a representative from another county of which he was not a resident.

It would be gratifying to follow the career of this young man, as step by step he ascended the ladder of fame, exhibiting versatility of talents, and superiority of mind in all the varied positions to which he was called, powers of which he was surely not unconscious. As a legislator, his compeers were James Madison, Patrick Henry, James Monroe and others whose fame became more than national. With Thomas Jefferson, Alexander Hamilton and other great men of the times, devoting their talents to the study of the Federal Constitution, his comprehensive mind was intensified by interest, illumined by discussion, broadened by observation and research, deepened by philosophical reflection, and the foundation was laid for the most comprehensive understanding of that masterpiece of all the world's governmental structures, the Federal Constitution. As one has said, "He looked through it with the glance of intuition. He was with it at its creation, and was in communion with it throughout his life."

It is strictly within the limits of my subject, and did time permit, we might refer to and amplify all the events of his life until his appointment to the supreme bench, for he was but forty-six at that time, and entitled to be classed as a young man. We could profitably go with him through the various



important events which, in rapid succession, crowded themselves upon him. We might notice his first act in congress, the announcement of the death of George Washington, in which he referred to him as "first in war, first in peace, and first in the hearts of his countrymen."

It would be pleasing to go with him as one of the three Commissioners appointed by President John Adams to France—then practically in open warfare with us—to witness the respect his gracious mien and strong personality begot, when a former representative had been excluded from that country; the forceful arguments, the patient dignity, the exceptional diplomacy with which he prevailed over Talleyrand, the greatest of all French diplomats.

We might observe the satisfactory manner in which he held, successively, the portfolios of War and State, taking up the one and laying down the other at the behests of those in authority solely that he might subserve the public weal, without regard to personal interests or ambitions.

These were but preparatory for the later events of his marvellous judicial life, a life fraught with consequences so great as to affect the perpetuity, aye, the very existence of the government itself. This will be better appreciated, if we contemplate what the consequences might, and probably would have been in the permanency of the nation, had Marshall made a mistake in judgment, or had he lacked the courage to construe the Constitution as he did. One has truly said, "He found the Constitution paper, and he made it power; he found it a skeleton, and he clothed it with flesh and blood."

By his marvellous qualities of reason and conscience, he laid broad and deep the foundations of national life, upon which Lincoln builded a superstructure, (though builded with the flesh and bone, and cemented with the blood of millions) an edifice so strong, so symmetrical, so beautiful, so grand, so sublime, that no power can destroy, or element mar; the aston-

ishment and admiration of the world; the idol and endearment of every loyal son.

It is difficult to determine what period or what acts of his eventful life to most admire; whether in his military or diplomatic exploits, or in annihilating the fiction that the three branches of government are co-ordinate, and firmly establishing the doctrine that the judiciary in a very important sense is supreme; in declaring the great principle of democracy, and destroying the last root of the fallacious dogma, that "the king can do no wrong," in issuing a subpoena *duces tecum* for President Jefferson, compelling a prejudiced and unwilling Executive to produce papers that might be helpful in maintaining the innocence of even so great a culprit as Mr. Burr, showing how much more he appreciated justice and the liberty of a citizen than the prestige or favor of power. In enunciating the implied powers of congress, in establishing the doctrine that "the States are constituent parts of the United States," thereby laying the foundation for the brilliant, and perilous, yet successful experiment of creating a national government by means of a written Constitution. In adjudging that the Constitution should be neither strictly or liberally, but naturally and reasonably construed.

In the masterly debates, in which as a young man he participated, in the legislature of Virginia, or in the ripe and mature years of his life, in the constitutional convention of the same state, where "with the fervor and almost with the authority of an apostle" in speaking of the judiciary he said: "The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to control him, but God and his conscience? I have always thought, from my earliest youth till now, that the greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or

a dependent judiciary;" or in the other great judgments expounding that Constitution which Mr. Gladstone declared to be the "most wonderful work ever struck off at a given time by the brain and purpose of man."

As we learn and contemplate the conditions which confronted Marshall under the new Constitution, it is not extravagance to say that it required a scope of intellectual power co-extensive with the broadest development of the human mind; a moral courage so sublime as to be oblivious to all consequences and considerations, except obedience to the commands of a live and quickened conscience. We must be convinced that Marshall possessed these qualities, and before we have long considered the conditions surrounding him, his character and work, must also be convinced that God prepares and raises up men for great emergencies whose powers are sufficient for the work before them; that the great Chief Justice was such an instrument, as much as Lincoln and others who might be named, none who believe in Omnipotence and Omniscience can for a moment doubt.

Who but a Marshall could have withstood the pressure and survived the storm of passion that beat upon him at the trial of Aaron Burr? A grandson of the eminent divine, Jonathan Edwards, ex-vice-president of the United States, late candidate for the presidency, lacking but one electoral vote of securing it, an astute lawyer, a valiant soldier, bold, audacious, unscrupulous, Burr stood before the court over which Marshall presided, for trial upon the charge of treason, the penalty for which was death.

He differed from Marshall in politics, and party passion ran high. Among the other acts of a vicious life which had rendered him opprobrious, his hands were reeking with the blood of Alexander Hamilton, the bosom friend of Marshall, whom he had just killed in a duel.

There was an almost universal cry for his conviction. The flexible words of the Constitution, an "overt act," had not

been construed and every reason that sways the ordinary judgment existed for such a course and construction as would insure a conviction. Even the council for the government, by more than implication, warned him that any rulings or construction of the law that did not tend to a conviction, would bring down upon him the anathemas of the people.

President Jefferson was greatly embittered against the defendant, and his personal influence and all the power of his administration were exerted to their utmost to secure his conviction. But Marshall the judge, arose in all the majesty of his power of mind and conscience—so patiently he listened, so dispassionately he considered, with such a calm dignity he demeaned, and with such unyielding firmness he maintained himself; with such convincing logic he met unsound and untenable propositions of law; with a self consciousness that he was invincible in his fixed determination that the law should be ascertained and applied to all alike, all these considerations were matters of scornful and contemptuous indifference to him, and found expression in his charge to the jury, in that memorable case. He said: "No man is desirous of becoming the peculiar subject of calumny. No man, might he let the cup pass from him without reproach, would drain it to the bottom. But if he had no choice in the case, if there is no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

Though tardily, ever prevailing and triumphant truth has asserted herself in the history of John Marshall. As is said by another, "in sustaining the Constitution, he unconsciously prepared for his own glory, the imperishable connection which his name now has with its principles."

It is of interest to note that after his great life work was practically finished, while a few appreciated what he was, and what he had done, it was so far from being acceptable to his

countrymen in general, that he declared, in letters to Judge Story, "To men who think as you and I do, the present is gloomy enough, and the future presents no cheering prospects. \* \* \* I fear no demonstration can restore us to common sense." That he was not fully appreciated is evidenced by the circumstance that shortly after his death in 1835, an effort was made to raise a fund for the erection of a monument to his memory in the city of Washington, but after about \$3,000 was obtained, the project failed, and nothing further was done for forty-five years, when, by the death of one of the faithful trustees, his executor discovered the fund increased to nearly \$20,000, and in 1884, just forty-nine years after his death, the work was completed, Congress having augmented the sum by a contribution of \$30,000.

Our hearts swell with exultant pride and are aglow with admiration, as we contemplate the glorious achievements of Grant, Sherman, Sheridan, Thomas and their comrades in arms, whose climax was reached in the surrender of the brave Confederate chieftains and their hosts at Appomattox, after the most memorable struggle of modern times. We may rejoice with greater joy at the grander peace and a more united country which resulted from their sacrifices. Our hearts may well be filled with gratitude as we view the life, character and marvellous accomplishments of the commander-in-chief of these heroic men, the new giant who came forth from the heart of the great people in 1861 filled with their hopes and aspirations, his heart radiant with the fire of patriotism which burned in their souls, his conscience stung with the wrongs which the blinded zeal and misguided passion of some had led them into; he of abiding faith and unfailing hope; he whose name we revere, and whose memory we cherish above every other, Abraham Lincoln.

I would not pluck a laurel from one of those immortal brows; I would not erase one word from the imperishable records of their glorious deeds, but truth and justice demand,

and the revelations of history clearly attest that the awful tragedy culminating at Appomattox was the victory of John Marshall, as well as that of Lincoln and Grant. Their deeds were the maintenance, by physical force, of the principles which Marshall had established by the power of reason under conditions requiring an equal degree of courage. During the fearful ordeal of the four years, through which the divinely appointed Lincoln led us, while people were groping in darkness, with imperfect vision and beclouded conception, he, with a keen insight, or rather a prophetic vision, grasped and relied upon those principles enunciated by Marshall, in a degree which we have heretofore not realized. In his inaugural in 1861, he quoted, in support of his position, the burning words of Marshall: "The government of the Union is a government of the people; it emanates from them; its powers are granted by them and are to be exercised on them, and for their benefit. The government of the Union, though limited in its powers, is supreme within its sphere of action, and its laws, when made in pursuance of the Constitution, form the supreme law of the land."

No words that orator can utter or pen inscribe are so eloquent a tribute to the crystalline clearness of intellect, the high standard of integrity and steadfastness of purpose of him whose name we honor, as a plain recital of what he did.

It may be an abuse of privilege to indulge in preachment on this occasion, but unless there is some lesson to be learned, something more than a selfish appropriation of the benefits which his efforts conferred, his labors were not worth the cost. As before me are creators and executors of the law, I cannot refrain from quoting a sentence—the result of long and careful consideration—from an address which I was privileged to deliver at a Congress of specialists a few years ago. It was said: "The danger to the perpetuity of our country is in the mob—not necessarily the riotous crowd which resorts to physical violence, but the equally dangerous organizations which

assume the garb of political, religious or social respectability, incited by fanatical and demagogical leaders, who in the language of John Milton—

“Bawl for Freedom in their senseless moods,  
And still revolt when truth would make them free;  
License they mean when they cry ‘Liberty.’ ”

The tragic and other lawless events of the past few weeks, has changed these prophetic words into shameful realities. In this hour when blind passion and mad unreason seems to be swaying the multitudes, we, to whom they have a right to look for counsel and guidance, can most bless our fellow men and best honor our names by emulating the example of the great man whose name and deeds we commemorate.

From his life and labors we may learn anew that fidelity to principle will in time be rewarded. With us as with him are grave responsibilities and great potentialities.

Well may we pray—

“Wake in our breasts the living fires,  
The holy faith that warmed our sires.”

Truly may we realize—

“Thy hand hath made our nation free;  
To serve her well, is serving Thee.”

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## MARSHALL AS THE EXPOUNDER OF THE CONSTITUTION.

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EDWIN W. CUNNINGHAM.

John Marshall was a great judge. His was an analytical mind that grasped generals and laid bare the details. He had the prescience of a prophet as to the effect of political principles under discussion. He saw the end from the beginning. His breadth of view was that of a statesman. His opportunities were great. He stood at the parting of the ways. His hand was on the tiller as the vessel left the harbor for an

unknown voyage. But great as were intellectual gifts, great as were intuitions and opportunities, none of these nor all of these were sufficient to make of him the great judge he was. Over all these and greater than all these, giving significance and value to all, was his sublime moral purpose. The political effect of a given construction of the Constitution was an important matter for consideration; but the question of the morals of the course was greater. His technical knowledge of the law and of precedents may have been limited, or at least lightly esteemed; but his sound judgment and comprehensive sense of right both legal and moral was most profound. A favorite close of an oral opinion was: "These seem to me to be the conclusions to which we are conducted by the reason and spirit of the law and the right. Brother Story will furnish the authorities."

Judge Marshall often trod in new paths. No one had gone before him. Unlike the moderns he was following no man's footsteps. Precedents, right or wrong, furnished no guide. Upon such an unknown way, his pole star was the right. He followed the voice of duty out of the maze. In an announcement which reminds of the martyr, he instructed the judiciary in his own and all future generations when he said: "That this court dares not usurp power is most true. That this court does not shrink from its duty is not less true. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without reproach, would drain it to the bottom. But if he has no choice in the case, if there is no alternative presented to him, but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

It was this sense of right and justice that led him to a correct determination of the questions arising in the Dartmouth College case, upon that clause of the Constitution forbidding



the impairment of the obligation of contracts, by the acts of any state. I once heard, in a paper read before this body, by an eminent author and jurist resident in a neighboring state, the position taken by the Chief Justice in that case seriously inveighed against, because under its protection corporations had grown to alarming and menacing proportions. The criticism was unwarranted. Common honesty, as well as the letter of the Constitution, required the interpretation given. To take away a right from a corporation by judicial enactment, only opens the way for a similar larceny of an individual's right when occasion shall arise. Let courts conscientiously keep within their sphere, while legislatures as carefully remedy the wrongs within theirs.

One hundred years ago when Chief Justice Marshall became the dominating spirit of the United States Supreme Court, very many of the principles now recognized, as at the foundation of our law, were unsettled. And practically all of that body of law growing out of the application of the recently made Constitution, to the heretofore independent sovereignties composing the new Union, was unknown. The revolutionary war had not far progressed when it was clearly disclosed what a rope of sand the articles of confederation were. The wisest, in all of the colonies, soon saw that if popular government was to be made permanent, on these western shores, and a government established sufficiently strong to repress internal schism, and withstand external force, the Union must be laid on other lines than those found in the articles of confederation.

By the adoption of the Constitution, the avowed objects of which were "to form a more perfect union and to secure the blessings of liberty to ourselves and our posterity," the United States took on the character of a national government, and to some measure lost that of a factitious league. Although the period of gestation had been some twelve years, the colonies were not fully prepared for the birth of the Constitution.

They still clung to the idea of state sovereignty, and violently opposed the growing and centralizing power of the National Union. The Constitution had been adopted by a narrow margin; and the creation of a national government by the terms of a written instrument was a bold novelty, a brilliant but perilous experiment.

There was little of real national feeling, and there was the repulsive force of not only the two sections, North and South, with their many diverse interests and each desiring separate nationality, but also of the thirteen distinct political units, which composed those sections. The consequence was, that later politics have not exhibited more violent and bitter controversies than those that raged for the last few years of the Eighteenth, and the first twenty of the Nineteenth century, around the questions of a centralized government and states rights, and incidentally thereto, of strict and liberal construction of the Constitution.

Washington had served two terms as president. The elder Adams was just about to finish one. Both of them had been ardent Federalists, and the whole political power of the government, thus far, had been bent toward strengthening the nationalizing tendency. No need had thus far arisen for the exposition of the Constitution upon these questions. Within a month of the expiration of his term, late in January 1801, President Adams named as Chief Justice of the Supreme Court, John Marshall. During all the stormy time that had preceded the adoption of the Constitution he had been an ardent Federalist, the close personal and political friend of Washington and Hamilton. With the inauguration of Jefferson on March 4th, 1801, the government passed under the political control of the anti-federalists, and the struggle between centralization and national strength, and states rights and natural imbecility, which finally culminated in the secession of 1861, began in earnest. Chief Justice Marshall was on guard in the Supreme Court.

The Federalist theory stood for a broad and liberal construction of the provisions of the Constitution, especially in matters involving the rights and relations of the central government. A construction which would give much of the elasticity and adaptability of an unwritten Constitution, to the otherwise rigid form of a written one. Added to these questions were those numerous ones naturally presenting themselves for determination in a rapidly developing country, so rapidly expanding in territory, and all material resources and political power. For the first time in the history of the world a nation was acknowledging a written Constitution as its supreme law. Would this Constitution be so treated by the courts as to afford room for growth, or would its construction be such as to stifle progress and finally strangle life? In meeting these questions conclusions must be reached in matters wherein books and authorities gave little aid. It was a task of construction. No one had gone before, either in theory or practice. The plow was turning new soil. That the task was accomplished in such a manner as that for one hundred years the country has survived the great stress of foreign war and mighty domestic insurrection, and the greater stress of unprecedented territorial expansion and material growth, amply vindicate Chief Justice Marshall's right to be called the defender of the Constitution.

For the purpose of illustrating the style and character of Chief Justice Marshall's opinions I quote some of the most important.

The rule that it is the duty of the court to set aside an act of the legislature if found inconsistent with the Constitution, is now so well established, that we all wonder that it could ever have been questioned. Yet this was the question presented in *Marbury v. Madison*, 1 Cranch 158. Congress had conferred upon the Supreme Court the authority to issue writs of mandamus to public officers, and the plaintiff sought the aid of the court by such writ to compel the issuance to

him of a commission as a justice of the peace for the District of Columbia, which had been fully executed by President Adams, but which had not been delivered before the expiration of his term. President Jefferson directed the defendant, then secretary of state, to refuse to deliver the commission. The court held "with an obitor dissertation of the Chief Justice," as Jefferson tartly observed, that while the commission ought of right to issue, yet the act of Congress conferring jurisdiction upon the Supreme Court in the issuance of writs of mandamus to public officers was void because the Constitution had limited the original jurisdiction in the issuance of such writs by the Supreme Court to those cases affecting ambassadors and other like officers, and to those cases in which a state shall be a party. With two questions the Chief Justice illumines and makes plain the path along which so many courts have since passed: "If an act of the legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or in other words, that it being not a law does it constitute a rule as operative as if it was a law?" Subsequently in the case of *Fletcher v. Peck*, 6 Cranch 87, this principle was followed and still further emphasized and applied to the sovereignty, within its realm, of the United States Constitution over the legislation of a state. The Chief Justice therein speaks of the sovereignty of the United States over the individual state, in a way that would have made glad the heart of Hamilton. "Georgia cannot be viewed as a single unconnected sovereign power, on whose legislature no other restrictions are imposed than may be found in its own Constitution. She is a part of a large empire; she is a member of the American Union, and that Union has a Constitution, the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states which none may claim a right to pass." In *Cohen v. the State of Virginia* he again repeats his favorite theme, "That the United States form many and

for most important purposes a single nation, may not be denied; these states are component parts of the United States. They are members of one great Empire; for some purposes sovereign, for some purposes subordinate."

In an ever-rising tide, the nationalizing tendencies and the federal purposes of the Chief Justice, find expression and reached their high water mark in the case of *McCulloch v. the State of Maryland*, 4 Wheaton 316. He realized that to preserve the union of states and the constitution on which it was founded, effect must not only be given to the expressly delegated powers, but these must be buttressed and protected by a liberal construction of the implied powers.

A hot political contest had issued in the election of a national administration, pledged to the establishment of a national bank. And in 1816 Congress incorporated the bank of the United States. A branch of this bank was established in Baltimore. The legislature of Maryland passed an act taxing all banks and branches thereof, not chartered by that state. This act was aimed directly at the United States bank. McCullough, the cashier of the Baltimore branch, refused to pay this tax. Judgment therefor was obtained against him in the state court, and the case taken to the United States Supreme Court. The questions raised were, does the provision of the Constitution conferring upon Congress the power to make all laws that were necessary and proper to carry into effect the powers enumerated in that instrument, authorize it to create a corporation, and if so may a state tax such a corporation? The first, a question of broad or narrow construction; the second, of state sovereignty. With a firm grasp on principles, and luminous logic, the Chief Justice decided both questions in favor of the plaintiff. He said in part:

"Although among the enumerated powers of government we do not find the word bank or incorporation, we find the great powers to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies. The sword and the purse, all

the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. The power being given, it is the interest of the nation to facilitate its execution. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous and expensive? Can we adopt that construction, unless the words imperiously require it, which would impute to the framers of that instrument when granting these powers for the public good, the intention of impeding their exercise by withholding the choice of means? The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object, is excepted, take upon themselves to prove the exception. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable." Upon the other question he said: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government the power to control the constitutional measures of another, which other with respect to those very measures, is declared to be supreme over that which exerts the control are propositions not to be denied. If the states may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the end of government. This was not intended by the American people. They did not design to make their government dependent on the states."

From this enlarged comprehensive and liberal view the Chief Justice never departed. In *Gibbons v. Ogden*, 9 Wheat 187, he still further explains: "What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny the government those powers which the words of the grant, as usually understood import, and which are consistent with the general views and objects of the instrument, for that narrow construction which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given as fairly understood render it competent, then we cannot perceive the propriety of this strict construction, nor adopt it as a rule by which the Constitution is to be expounded."

Enough has been quoted to show the virility of thought and profundity of grasp with which the great Chief Justice came to the most important questions which ever confronted the government. I say the most important, for suppose that contrary views of these great constitutional questions had been taken, not strength and coherency enough had been left to the general government to have survived to 1861, to say nothing of its weathering the mighty shock of Civil War.

As great men as Chief Justice Marshall have adorned the bench in this and other lands, but none have met so great opportunity. The work he did was unique and extraordinary in its character, and most momentous in its results. The views of the nature of the Constitution which he entertained, and built into the fabric of our growing government, has enabled it to withstand the shock of war and the peril of growth. John Marshall was not only the expounder of the Constitution but the conservator of the Nation.





## THE COMMON LAW IN KANSAS.

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J. D. M'FARLAND.

The first legislature held in Kansas passed an act adopting the common law as the rule of action in the then territory. The act is Chapter 96 of the territorial statutes of 1855 and is as follows:

"Section 1. The common law of England and all statutes and acts of Parliament made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States and the act entitled, 'An Act to organize the territory of Nebraska and Kansas,' or any statute law which may from time to time be made or passed by this or any subsequent legislative assembly of the territory of Kansas, shall be the rule of action and decision in this territory, any law, custom or usage to the contrary notwithstanding.

"Sec. 2. Punishment, by virtue of the common law, shall, in no wise, be other than fine and imprisonment, and such fine shall not exceed one hundred dollars, and such imprisonment shall not exceed six months; nor shall any of the British statutes for the punishment of crimes and misdemeanors be in force in this territory."

This act was repealed and reenacted in 1859 in the same words except that the words "in aid thereof" were inserted after the words "all statutes and acts of Parliament," and as amended remained in force until the General Statutes of 1868 were adopted, when it was repealed.

The statute which may be regarded as the substitute for this act is Sec. 3 of Ch. 119 of Gen. Stat. of 1868 which reads as follows:

"The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, shall remain in force in aid of the General Statutes of this state; but the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any General Statute of this state; but all such statutes shall be liberally construed to promote their object."

The statute last quoted has remained in force ever since 1868 and is now in force.

There is a marked difference in phraseology between the act of 1855 adopting the common law and the statute now in force relating to the same matter. The earlier act provides in effect that unless repugnant to or inconsistent with the Constitution of the United States and the organic act or some statute law passed by the legislative assembly, the common law of England and all statutes and acts of Parliament made prior to the fourth year of James the First, of a general nature and not local to that kingdom shall be the rule of action and decision, any law, custom or usage to the contrary notwithstanding. The statute now in force declares that "the common law" as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people shall remain in force in aid of the General Statutes of the state; the rule that statutes in derogation of the common law shall be strictly construed is abolished, and it is declared that all General Statutes of the state shall be liberally construed to promote their object.

It will be observed that the present law makes no mention of statutes or acts of Parliament, and mentions no time at which the common law is to be regarded as fixed for the purpose of its adoption into this state, using only the phrase "the common law," while the language of the act of 1855 is the common law of England and all statutes and acts of Parlia-

ment made prior to the fourth year of James the First and which are of a general nature not local to that kingdom.

These differences suggest some inquiry in regard to what it is that is to be taken and regarded as "the common law" which has been generally adopted in this country as the basis of our jurisprudence. In discussing this matter our first inquiry will be in regard to the extent to which the common law of our adoption had been modified by British statutes, and our second, the time at which the common law is to be regarded as fixed for the purpose of its adoption in this country; the latter will include an inquiry into the effect of legislative acts of adoption, or the absence of them, the distinction to be made in case the territory in question was a part of the original colonies or was subsequently acquired, as well as some observations on the evidences of our common law.

When the common law is spoken of we at once recur to Blackstone's division of the municipal law of England into the unwritten and written and the satisfactory definitions of and distinctions between them that he sets forth. The unwritten law, or *lex non scripta* generally designated the common law, consisted of certain established customs, rules and maxims, generally applicable throughout the kingdom, not formulated in words by edict of sovereign or act of Parliament, but relying for their authority upon the fact that they had been used and observed for "time whereof the memory of man runneth not to the contrary." These laws were not anywhere written down but were in theory at least known to the judges of the several courts who were the depositaries of the laws and the living oracles who must decide in any case within their jurisdiction and coming before them what the law was as applicable to that particular case. Their decisions became precedents and these precedents were the principal and most authoritative evidence of the existence of any custom, rule or maxim asserted to be a part of the common law. The precedent was not, however, necessarily the law, and if a

judge was of the opinion that his predecessor was clearly wrong it was his duty to disregard the precedent and decide according to the law of the land. The principles of the common law were regarded as immutable; the results of their application might vary; old rules might be modified or entirely abrogated and new ones made to meet varying conditions and circumstances; the light of wisdom might sometimes fail the living oracles who were its depositaries and expounders, and that made to appear the law which was not the law, but the fundamental principles of the law itself always remained the same.

The written laws of the kingdom were "statutes, acts or edicts made by the King's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in Parliament assembled."

The marked difference between the written and unwritten law kept each separate and distinct from the other, but this distinction has not been observed with respect to the constituent elements from which have been formed the American common law. The general doctrine in this country is that in the absence of any express statutory provision in regard to their adoption, British statutes in aid of or to supply the defects of the common law, made prior to the time of the adoption of the common law in this country are to be regarded and taken as a part of the common law thus adopted.

In *Patterson v. Winn*, 5 Pet. 239, one question to be decided was whether certain British statutes were to be regarded as as part of the law of Georgia and the Supreme Court of the United States after holding that the common law was the law of Georgia, with respect to the statutes in question said:

"These statutes being passed before the emigration of our ancestors, being applicable to our situation, and in amendment of the law, constitute a part of our common law."

So that it may be regarded as settled that the term "the common law" when applied to the common law adopted in

America includes not only the common law properly so called but also British statutes made prior to the time of such adoption and applicable to our situation, and in amendment of the law.

Our next inquiry is in reference to the time at which the common law is to be regarded as fixed for the purpose of its adoption into this country.

The common law of England was regarded as immutable but in reality the rules of the common law were being continually varied, modified, abrogated and added to to meet the changed condition and circumstances of the people who were governed by them and who claimed their benefits; so that in their practical operations and effects the laws of one period were not always the same as those of another. It is also to be borne in mind that the common law adopted in America included British statutes in aid of and to supply defects in the common law, and that these statutory amendments varied from time to time. In view of the various modifications being thus constantly brought about it is of some importance to know the time at which the common law for the purpose of its adoption is to be regarded as established.

In many of the states legislative acts of adoption have been passed. The first act of this kind was passed by the General Convention of delegates of the colony of Virginia, which assembled May 6, 1776, and this act in substance has been by legislative action made the law of several of the states. It is the basis of our territorial act of 1855. By the Virginia act and the other acts which have followed it in that respect, all statutes and acts of Parliament made prior to the fourth year of James the First are declared in force subject to the exceptions generally incorporated in all such statutes. The reason this time was fixed by the Virginia Assembly was no doubt because that is the date of the first permanent settlement and establishment of a territorial government in the Virginia

colony and in this country, it being the date of the settlement at Jamestown in 1607.

Where the adoption act fixes a date, British statutes made prior thereto constitute a part of our common law and subsequent statutes are not to be regarded; but where no date is fixed by the adoption act, or where there is no adoption act, the date from which subsequent British statutes are of no effect must be determined by judicial decision, and probably in most cases the date at which the common law, strictly speaking, is to be regarded as fixed for the purpose of adoption must be settled by judicial decision as adoption acts in that respect are generally limited to British statutes; however, the fixing of the latter date is not so important, for the reason that American courts are not bound to take English decisions as absolutely authoritative evidence of what the common law was at any given time.

It may be observed here that there is no common law of the United States. Each state has its own common law. The common law of one state is not necessarily the common law of another. It is held in this state that the common law of another state, where the common law appears to have been adopted and is in force in such state, will be presumed to be the same as that of Kansas, but that it may be shown by evidence to be otherwise.

It may also be noted that the common law in states which have adopted the common law also includes the doctrines of equity jurisprudence.

The fact as to whether a given state is comprised of territory which was one of the original colonies, or territory subsequently acquired and settled but which at the time of its settlement had no permanent inhabitants or fixed government, or whether it is comprised of territory acquired since the settlement of the original colonies, and which at the time of its acquisition had an organized and civilized government where a system of jurisprudence other than the common law

prevailed has a bearing in determining the time when the common law is to be regarded as having been adopted in such state.

Massachusetts is a representative of the class first mentioned and Kansas, which is a part of the territory purchased from France in 1803, under the general designation of Louisiana, and Louisiana at that time having an organized government where the civil and not the common law prevailed, may be taken as an example of the latter class.

In the territory first mentioned the theory is that the earlier settlers brought with them the laws of England as they then existed, except such as were inapplicable to their new condition. When they settled here they claimed the benefits and protection of such laws, and thus upon their arrival in this country transplanted and adopted them here. The laws of England became their common law as a matter of right and without legislative adoption. The laws thus adopted and made their common law were the *lex non scripta* and British statutes of a general nature in force at the time of the emigration of the ancestors, except such parts of the same as were inapplicable to their new condition and circumstances.

The Supreme Court of Massachusetts in *Commonwealth v. Knowlton*, 2 Mass. 529, in declaring what forms the body of the common law of that state says:

"Our ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law, thus claimed, was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never reenacted in this country, but were considered as incorporated into the common law. Some few other English statutes, passed since the emigration, were adopted by our courts, and now have the authority of law derived from long practice. To these may be added some ancient usages, originating probably from laws passed by the legislature of the colony of the Massachusetts

Bay, which were annulled by the repeal of the first charter, and, from the former practice of the colonial courts, accommodated to the habits and manners of the people. So much, therefore, of the common law of England, as our ancestors brought with them, and of the statutes then in force, amending or altering it,—such of the more recent statutes as have been since adopted in practice—and the ancient usages aforesaid,—may be considered as forming the body of the common law of Massachusetts, which has submitted to some alterations by the acts of the provincial and state legislatures, and by the provisions of our Constitution.”

The settlers of the original colonies brought with them the laws of England in force at the time of their emigration and on their arrival made them their common law because they came into a country without civilized government or established laws, and after coming remained subjects of Great Britain until separated as the result of a successful revolution.

But the facts in regard to the territory comprised in the Louisiana purchase are different. It seems to be logical that here the common law prevails only by virtue of statutory adoption. The first legislature of the territory of Colorado passed an adoption act and the Supreme Court of that state in *Herr v. Johnson*, 11 Col. 393, in considering the effect of such act observes:

“The common law of England had never obtained in this portion of the North American continent previous to its acquisition by our general government. This portion of our country was never under British dominion. The acquisition thereof was by treaty and purchase long after the Revolution, and from powers not having the common law, but the civil law; so that the first foothold or actual existence of the common law of England here was necessarily by legislative enactments, and necessarily limited according to the expression of such enactments.”

New Mexico was acquired by the United States in 1848. At the time of its acquisition the civil law prevailed there. Subsequently the legislature adopted “the common law as recognized in the United States of America.” In *Browning*



v. Browning, 3 N. Mex. 659, the Supreme Court of that territory was called upon to decide what the legislature intended by the above quoted language used in the adoption act and in their opinion say:

"From the authorities cited, it is clear that there are three classes of 'common law as recognized in the United States of America': (1) In those states which were a part of the original colonies, and which have not by legislation adopted statutes prior to a particular date, the unwritten law, and such general British statutes applicable to their condition as were in force at the time of the formation of the colonial governments, and such as were afterward adopted, expressly or tacitly, constituted the common law; (2) in those states which have adopted the common law and the British statutes passed and in force prior to the date fixed in the act of adoption, and were of a general nature and suitable to their situation, such common law and statutes constitute their common law; and (3) in those states and territories which were not of the original colonies, and which have not in terms adopted any English statutes, but have adopted the common law, the unwritten or common law of England and the acts of Parliament of a general nature, not local to Great Britain, which had been passed and were in force at the date of the war of the Revolution, and not in conflict with the Constitution or laws of the United States, nor of the state or territory, and which were suitable to the wants and condition of the people are the common law of such states and territories.

"This territory belongs to the last class. It was not a part of the original colonies, but was acquired in 1848. The legislature had not in terms adopted any British statutes nor has it undertaken to define what is embraced in the words 'common law,' used in Section 1823 *supra*.

"We are, therefore, of opinion that the legislature intended by the language used in that section to adopt the common law, or *lex non scripta*, and such British statutes of a general nature not local to that kingdom nor in conflict with the Constitution or laws of the United States, nor of this territory which are applicable to our condition and circumstances, and which were in force at the time of our separation from the mother country."

In Aetna Life Ins. Co. v. Swayze, admrx., 30 Kan. 118, the

question was as to the power of an administrator in this state to compromise a claim in favor of the estate without the consent of the probate court. On the one hand it was contended that an administrator had such power at common law, and that the statute did not take it away; on the other hand it was claimed that administrators in this state could only exercise such powers in that behalf as were given them by statute and could not exercise any common law authority in respect to compromising debts due the estate. The Supreme Court referring to a Massachusetts case which held that a statute empowering courts of probate to authorize administrators to compromise demands in favor of the estate did not repeal the settled rule of the common law in force in that state, held that such decision was not applicable in this state and denied that an administrator in this state was clothed with any such common law power. The court states the rule that "where a whole subject has been revised by the legislature the common law is superceded by the statute unless it is needed to help out or aid the statute," but the court also refers to the manner of the adoption of the common law in Massachusetts quoting from *Commonwealth v. Knowlton supra*, and then states that Kansas was a part of the Louisiana purchase, and that in Louisiana the civil law and not the common law prevailed at the time of such purchase and quotes the adoption acts of this state, and it is fairly inferable from the opinion that the court entertained the view that the common law is in force in this state only by virtue of legislative adoption.

Judge Cooley says:

"The evidence of the common law consisted in part of the declaratory statutes we have mentioned, in part of the commentaries of such men learned in the law as had been accepted as authority, but mainly in the decisions of the courts applying the law to actual controversies. While colonization continued—that is to say, until the war of the Revolution actually commenced—these decisions were authority in the colonies, and the changes made in the common law up to the same

period were operative in America also, if suited to the condition of things here. The opening of the war of the Revolution is the point of time at which the continuous stream of the common law became divided and that portion which had been adopted in America flowed on by itself, no longer subject to changes from across the ocean, but liable still to be gradually modified through changes in the modes of thought and of business among the people as well as through statutory enactments." (Cooley Const. Lim. 25).

The Supreme Court of this state in an early case seems to intimate that the fourth year of James the First is the date at which the common law is to be regarded as fixed for the purpose of its adoption in this state. In *Kansas Pacific Rly. Co. v. Nichols, Kennedy & Co.*, 9 Kan. 235, it is said:

"We get our common law from England. It was brought over by our ancestors at the earliest settlement of this country. It dates back to the fourth year of the reign of James the First, or 1607, when the first English settlement was founded in this country at Jamestown, Virginia. The body of the laws of England as they then existed now constitute our common law. It is so fixed by statute in this state, (Comp. Laws, 678; Gen. Stat. 1127, Sec. 3,) and is generally so fixed by statute or by judicial decisions in the other states."

The opinion is ventured that the most reasonable rule is that the common law intended by our act of adoption now in force is the common law or *lex non scripta* and British statutes of a general nature in force at the date of the American Revolution.

The evidences of our common law are the commentaries of learned writers, the decisions of the courts and the statutes in force when the common law was adopted and which became a part of it. Statutes are the highest and best evidence of themselves, and where a statute had, prior to its adoption as a part of our common law, received a judicial construction or interpretation in the English courts, such construction and interpretation accompanied it and became a part of it, but subsequent decisions are to be regarded as persuasive only and not authoritative. Upon this point Chief Justice Marshall in

Cathcart v. Robinson, 5 Pet. 280, speaking of the construction placed upon certain British Statutes in England before their adoption here says:

"The received construction in England at the time they are admitted to operate in this country, indeed to the time of our separation from the British empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But, however, we may respect subsequent decisions, and certainly they are entitled to great respect, we do not admit their absolute authority. If the English courts vary their construction of a statute which is common to the two countries, we do not hold ourselves bound to fluctuate with them."

English decisions as evidence of the common law properly so called, are not so authoritative. It is well settled that decisions of English courts rendered since the Revolution, though entitled to respect, are not binding upon American courts. Prior decisions are entitled to greater weight, and when clear and well settled may be regarded as proper exponents of the common law. They cannot, however, be said to be absolutely binding for the reasons that judicial decisions were never regarded as the law itself, but only evidence of it, and it was the common law we adopted and not English decisions.

Having discussed the meaning of the phrase "the common law" as used in our adoption statute, the other provisions of that statute will now be considered. It is not the whole of the common law within the meaning of that term that is in force. Much has been taken away by the statute that otherwise would remain.

First. The common law relating to criminal offenses and procedure is not in force in this state. There are no common law offenses here. In *State v. Young*, 55 Kan. 356, the court says:

"As some of the authorities cited show, murder in Kansas is materially different from murder by the common law of England. In Kansas there are no common law offenses, and

there can be no conviction except for such crimes as are defined by statute. The defendant, therefore, cannot be prosecuted for, or convicted of any other than a statutory crime."

Our code has revised the whole subject of criminal procedure, and thereby the common law in that respect has been superseded.

Second. The entire system of pleading and practice in civil cases as it was at common law, both in courts of law and equity, is abrogated and a code of practice substituted by statute.

Third. Our written constitutions, federal as well as state, destroy or modify so as to conform with them whatever it finds in the common law repugnant to or inconsistent with them.

Fourth. The common law has been modified, changed and altered in many particulars by statutory enactments. Our libraries are crowded with legislative acts, many of which make radical changes in settled rules of the common law and instances are not infrequent where a "whole subject has been revised by the legislature" and the common law upon that subject has become "superseded by the statute" within the decision of our Supreme Court in *Ætna Life Ins. Co. v. Swayze*, admrx. *supra*.

Fifth. The abrogation of the common law rule that statutes in derogation thereof shall be strictly construed, and the command written in the statute that all general statutes of this state shall be liberally construed to promote their object together with the guarded expression that it is "in aid of the general statutes of this state" that the common law shall remain in force, has removed obstructions and made the work of modifying the common law by statute an easy one.

Sixth. There has been adopted in this state only such portions of the common law as are suited to the condition and wants of the people, and

Lastly. It is the common law as modified by judicial decisions as well as the condition and wants of the people that remains in force in this state in aid of the general statutes.

The last two agencies for modification may be very far reaching in their consequences. Modification by judicial decisions, however, really includes both, as it is only courts that have authoritative right to say in a given case that the common law is inapplicable. And it is also true that only such parts of the common law as are suited to our condition and circumstances were ever regarded as having been adopted in this country. In the colonial states it is held that the early settlers brought with them from England such principles only as they deem expedient for the situation in which they were about to place themselves.

Modification of the common law by judicial decision or "judge made law" has been the subject of some adverse criticism, but it is a necessary part of the system. The system is designed to meet the varying conditions and circumstances of actual transactions as well as the growth and development of society. The law cannot remain stationary because the people who live under it are continually progressing. New questions growing out of changed and improved conditions are constantly arising, and to meet these the rules of the common law are extended and modified in analogy with prior decisions or by the application of principles which existed before but had never been applied because the occasion had not arisen. The growth and development of the law in a natural way is possible only when left to be shaped and moulded by judicial decisions. The adaptation of the law to the affairs and concerns of society goes on gradually and there is no departure from immutable principles. Under such a system better results are attainable than by attempting to write into a code all laws which are necessary to meet every condition that may arise out of the complex and varied affairs of modern life.

Such an attempt would prove wholly unsatisfactory. It is not in line with the true theory of law and its natural development. Law, broadly speaking, is something that exists—is not made. Its central idea and aim is justice. Any attempt to confine it within the bounds of fixed words will destroy some of its finer attributes. A nearer approach to absolute justice is possible when the principles of the common law are applied with clear reason and understanding and righteous judgment to a particular case than through an attempt to set down in advance fixed rules which must be applied to each case when it arises.

After so much alteration and elimination it may seem that but little of the common law remains, but the truth is directly the reverse. Judge Dillon in his delightful volume of lectures on the laws and jurisprudence of England and America says:

“Now the great fact, which, as we approach this subject meets our view, is that the common law (including in the phrase ‘common law,’ as here used the supplemental equity system of the Court of Chancery which grew out of the common law and constitutes a part of it), underlies the whole system of American law and jurisprudence. \* \* \* I do not stop to inquire how the common law came to be introduced here and adopted by us. I deal with the fact as it exists, which is that the common law is the basis of the laws of every state and territory of the Union, with comparatively unimportant and gradually waning exceptions.”

The reason for the survival of the common law is found in the fact that its equal has never been known as a system of jurisprudence adapted to the characteristics of the people who live under it. It originated with a people who were independent and self reliant; who believed in personal freedom and liberty of thought; who demanded a share in the administration of public affairs and would not tolerate arbitrary power; a people who had a strong sense of justice and whose respect for law and order approached veneration; a people who believed in home, home institutions, human liberty and property rights; a people, too, who had in them a genius for gov-

ernment. The system known to us as the common law meets the requirements of such a people. The customs and maxims out of which this complex yet simple system has been developed were as crude and inartificial in the beginning as the habits and manner of life of the people who originated and applied them. They were, however, a progressive people and in time those half civilized tribes became the dominant race of the world, but the common law was found inherently strong enough and flexible enough to meet the requirements of these changed conditions and circumstances. The Anglo-Saxons,—and by Anglo-Saxons I mean all English speaking people,—are a masterful race; they are born rulers and leaders. The limit of their ascendancy is not yet reached. The events of the last three years only make clearer the certain trend of events. The hand of destiny beckons and the answer comes as it came from Hamlet, "Go on; I'll follow thee." And it is safe to say that wherever English speaking people shall be found shaping and controlling affairs, the principles of the common law will eventually furnish the rules by which wrongs will be redressed and rights enforced.



## UNANIMITY VERDICTS.

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FRANK WELLS.

In considering the origin of the jury system I am reminded of Mark Twain weeping over the grave of Adam; he knew it was the true grave of Adam because in all the thousands of years since his death, no one had ever been able to prove that it was anywhere else. Unlike the location of Adam's grave the origin of the jury system has been ascribed to various sources upon evidence equally conclusive. The Normans, the Saxons, the Gauls, the Romans, the Trojans, the Norsemen, the Germans and the Danes have each had the honor thrust upon them. Some have even maintained that it came from Asia through the crusades, and the fact that the number of petit jurors corresponds with the number of the Apostles has also received consideration. The invention has been imputed to Alfred the Great, "to whom," says Blackstone, "on account of his having done much it is usual to attribute everything." [Ency. Social Reforms, 171.]

At an early date the jury seems to have been intended principally to protect the citizen from oppression by the government. Mr. Lysander Spooner in his "Trial by Jury," published in 1852, says: [Ibid, 172.]

"Since Magna Charta, 1215, there has been no clearer principle of English or American constitutional law than that in criminal cases it is not only the right and duty of juries to judge what are the facts, what is the law, and what the moral intent of the accused, but that it is also their right and their primary duty to judge of the justice of the law, and to hold all laws invalid that are in their opinion unjust or oppressive,

and all persons guiltless in violating or resisting the execution of such laws. Otherwise, the government will have everything its own way, the jury will be mere puppets in its hands, and the trial will be in reality a trial by the government."

It is probably unnecessary to say that this is not cited as being the law today, but as showing an ancient reason why juries were formerly demanded. In a political system where the government was over and separate from the people, it is easy to understand how much more juries would be the palladium of the liberties of the people, than in a government "of the people, by the people and for the people."

It would seem that originally verdicts of juries were not required to be unanimous. In Ethelred's law we find this provision: [Thorpe, *Ancient Laws*, I 299, London 1840.]

"Let doome stand where (the twelve senior) thanes are of one voice; if they disagree, let that stand which eight of them say, and let those who are there outvoted pay each of them six half marks."

How we would occasionally rejoice to apply the latter part of this ancient rule.

The Canadian Law Journal says that the origin of the rule requiring unanimity is apparently correctly stated by Mr. Forsyth, Q. C., as follows: [3 Cent. Law Jour., 200.]

"The jury cannot be discovered in the form in which we know it prior to the reign of Henry II. The Grand Assize, a tribunal for the settlement of questions affecting the title to land, which was fully developed in the reign of that monarch, and the trial of criminals by invoking compurgators, seem to be the germs out of which our present jury system grew. In trials of these sorts it was necessary to obtain the agreement of twelve men, but not necessarily of the first twelve selected. Dissentients were rejected and jurors added till the necessary unanimity was attained. Moreover, as is well known, the early jurors were nothing but witnesses. From various analogies the number of twelve came to be looked upon as the necessary number of witnesses to establish the credibility of an accused person, or the existence of certain facts."

A brief review of the nature of the Grand Assize and of compurgation makes the conclusion of Mr. Forsyth seem very probable. The statute of Grand Assize ordained, "that in all cases in which the ownership of land, the rights of advowson, or the claims of vassalage, came in question, four knights of the country should be summoned, who joining with them twelve men, neighbors of those whose rights were in dispute, should hear from them, upon their oaths, the truth of the matter in question. If these twelve could not agree in the tale they told the knights, the minority were dismissed, and others chosen in their stead; and this was repeated until twelve men were found whose tale was uniform, and then according to it judgment was given." [2 Green Bag, 300.]

As to compurgation Blackstone says:

"He that has waged, or given security, to make his law, brings with him into court eleven of his neighbors; a custom which we find particularly described so early as in the league between Alfred and Gunthran the Dane; for by the old Saxon constitution every man's credit in courts of law depended upon the opinion which his neighbors had of his veracity. The defendant, then standing at the end of the bar, is admonished by the judges of the nature and danger of a false oath. And if he still persists, he is to repeat this or the like oath: 'Hear this, ye justices, that I do not owe unto Richard Jones the sum of ten pounds, nor any penny thereof, in manner and form as the said Richard hath declared against me. So help me God.' And thereupon his eleven neighbors, or compurgators, shall avow upon their oaths, that they believe in their consciences that he saith the truth." [3 Blackstone, Sec. 342.]

In the fourteenth century the rule seems to have been first adopted that the original twelve must all agree to render a verdict. This rule of total unanimity seems to be peculiar to the English law. Its wisdom has often been questioned, and seldom defended, except as an almost continual adherence to the rule may be its defense.

Hallam, in his *Middle Ages*, speaks of "the grand principle of the Saxon polity, the trial of facts by the coun-

try," and expresses the hope that Englishmen may never swerve from that principle, "except as to that preposterous relic of barbarism, the requirement of unanimity." [3 Cent. Law Jour., 300.]

The English Common Law Commissioners of 1831, condemned the rule in very positive language. Bentham calls it "no less extraordinary than barbarous." Judge Cooley says it is "repugnant to all experience of human conduct, passions and understanding."

Hon. Thomas Ewing, speaking of this rule, said:

"The day is not far distant, when, if the absurd and injurious requirement of unanimity is adhered to, trial by jury in civil cases will be abandoned. I think it is the political duty of American patriots and statesmen to free the jury system of this defect, and thus insure its perpetuity. It is one of the vital forces of popular government. The requirement of unanimity, a belated rule of forgotten and barbaric form of trial by witnesses, became incorporated without reason to support it in the English system of jury trials in civil cases, and has been handed down from generation to generation as though it were one of the jewels of our race. If it were merely useless, we might excuse our weakness in preserving it; but, as it is also hurtful and leads to weaken the respect of the people for the jury system, it ought to be abolished." [25 Am. Law Rev., 822.]

Mr. Justice Miller, in an article on "Trial by Juries," says:

"I am, therefore, of the opinion that the system of trial by jury would be much more valuable, much shorn of many of its evils, and much more entitled to the confidence of the public as well as of the legal and judicial minds of the country, if some number less than the whole should be authorized to render a verdict. I would not myself be willing that a bare majority should be permitted to do this." [Ibid, 825.]

In August, 1891, the majority report of a special committee appointed by the American Bar Association to report on that subject, recommended, "That the American Bar Association recommend to the bar associations of the states the support of such legislation, or constitutional amendments, as will

provide for a verdict by three-fourths of the jury in civil cases." [Ibid, 825.]

In a quite recent article Judge Caldwell says:

"If unanimity were tantamount to infallibility, there would be some reason for the rule, but there is no more infallibility in twelve men than in seven or nine. Its baneful effects on the jury and on the administration of justice are very great. The superstition should be abolished by law." [Law Notes, Dec., 1900, 162.]

Let us now briefly examine some of the reasons urged respectively for the retention and the abolition of the rule.

Age is in its favor, but age alone is not proof of worth. Every institution that claims the respect of the world should have something to commend it besides its age. The jury system has been for centuries considered a "bulwark of liberty," and to remodel it may be thought by some like remodeling an old cathedral, around which cluster the sacred memories of centuries. But such forget that one is valuable chiefly as a ruin and for the sentiments that surround it, while the other is a practical thing for every-day use in the twentieth century. Sentiment may properly control the destiny of the one, but practicability alone should control the other.

It is urged that the rule of unanimity secures full discussion and deliberation. As a matter of fact nearly every jurymen has made up his mind before the jury retires. That a majority of ten or eleven will be convinced by a minority of one or two is extremely improbable. Practically in every case where two-thirds of the jurors agree, the minority must come to them or no verdict will be had.

To provide for full discussion among the jurymen, and yet insure a verdict in every case where eight or more agree, Ex-Governor Koerner, of Illinois, made a recommendation some years ago that may be interesting. [2 Cent. Law Jour., 715.] It provided that the court should minute the exact time when the jury retires to consider of their verdict, that a verdict rendered within six hours must be unanimous; that after that

time and within the six hours following, a verdict of eleven should be received; within the next six hours one of ten; within the next six hours one of nine; and after that one of eight. Such a rule seems to insure whatever of value there may be in prolonged discussion, without the chief objection to the present system.

It has been said that under the present system the responsibility felt by each jurymen is greater, because he knows that no verdict can be rendered except by his individual concurrence. But he also knows that if a verdict is rendered the responsibility of it will be shared with eleven other men. Would not the feeling of responsibility be greater if each juror knew that his individual vote might determine the result one way or the other?

Again it is said, the opinion of twelve men is more likely to be right than the opinion of a less number. True enough. But so is the opinion of a majority more likely to be right than that of a minority, and yet, under our present system, we allow the opinion of one man to override that of eleven. Suppose a jury unable to agree stand eleven to one, the present rule gives the opinion of the one man just as much weight as that of the eleven.

In criminal cases the unanimity rule is generally defended upon the ground that if one of the jurors is not convinced of the prisoner's guilt, there exists such a reasonable doubt that a conviction should not be had. Upon this theory a hung jury should be equivalent to an acquittal. But, no, if one juror hangs out for conviction, though eleven believe the defendant innocent, a new trial is had; and it is possible that out of the two juries a bare majority of thirteen to eleven may convict a man of the highest crime known to the law.

Nearly all other questions arising in human affairs are settled by a majority. A bare majority suffices to elect a president, to decide the most important legal questions, or to determine the policy of our government.

The unanimity rule requires twelve men, of different physical constitutions, with different education and training, to think alike. We all know that different men think differently. To say that twelve men, selected as jurors are selected, must all come to the same conclusion in relation to any disputed fact, is to encourage a majority in self defense to coerce the minority, and often results in a compromise verdict which does not represent the honest judgment of any single juror.

The present rule makes bribery comparatively easy and effective. I am not one of those who believe bribery of jurors to be a common occurrence; but that in important cases it is sometimes resorted to, we cannot doubt. As Shakespeare says:

*"The jury passing on the prisoner's life,  
May in the sworn twelve have a thief or two,  
Guiltier than him they try."*

If nine jurors could render a verdict, bribery would be practically impossible.

To abolish the unanimity rule would, however, require a constitutional amendment. In the case of *American Publishing Co. v. Fisher, et al.*, 17 Supreme Court Reporter, 618, decided in April, 1897, Justice Brewer in rendering the opinion of the court, after holding that either the seventh amendment of the United States Constitution, or certain acts of Congress, secured to every litigant in actions at common law in the territory of Utah the right to a trial by jury, says:

"Now, unanimity was one of the peculiar and essential features of a trial by jury at common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this essential and substantial feature thereof is one abridging the right. It follows, therefore, that the court erred in receiving a verdict returned by only nine jurors, the others not concurring."

In the same opinion he also says:

"In order to guard against any misapprehension, it may be

proper to say that the power of a state to change the rule in respect to unanimity of juries is not before us for consideration."

That such a change may be made by the states would seem to follow from the decision of the same court in *Hurtado v. California*, 4 Sup. Ct. Rep., 119, where they say:

"A trial by jury in suits at common law pending in state courts is not, therefore, a privilege or immunity of national citizenship, which the states are forbidden by the fourteenth amendment to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process according to the law of the land. This process in the states is regulated by the law of the state."

On the whole I conclude that a change in the rule requiring unanimity verdicts is desirable, but that the path of the reformer who attempts to force the change, will be beset with many difficulties.



## DIVORCE.

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N. L. BOWMAN.

A paper on the subject of "Pardons," to be written by one of experience, was originally intended to occupy this position on the program. The author's official duties depriving him of the necessary time to prepare such paper, the subject of divorces suggested itself to your executive committee. Doubtless because of its similarity, being a kind of parole with absolute pardon after six months of good behavior. And the writer was requested to prepare a paper on the latter subject.

As a general rule the writer of this article is opposed to life punishment for innocent mistakes of youth, or for having been deceived by false appearances, pretenses or declarations.

The most convenient divorce law of which we have any knowledge is found in the Koran, which provides that a husband may dissolve the marriage union by saying to his wife three times, "Thou art divorced." We do not want to be understood, however, as recommending the adoption of that law for Kansas.

The Spartans rarely divorced their wives, and divorcement scarcely, if at all, existed during the early period of the Roman Republic. On the other hand, we are informed that the Athenians and other Greeks secured bills of divorcement from their wives for trivial causes. Whether trivial causes to them, or whether for such causes as now appear to us to be trivial, we are not informed.

Under the Roman Empire the granting of bills of divorcement was extensively practiced, and the right to obtain such

was vested in the wife as well as the husband. The enactment of the Mosaic law was as follows: "When a man hath taken a wife and it come to pass that she find no favor in his eyes, because he hath found some uncleanness in her, then let him write her a bill of divorcement and give it in her hand and send her out of the house."

The statutes of our own state concerning divorces, and prescribing grounds upon which the same may be granted, are very liberal; and, we think, justly so, so long as there are practically no restrictions upon the right to enter into the marriage relation. Section 1 of Chapter 123 of the General Statutes of Kansas of 1897, provides: "The marriage contract is to be considered in law as a civil contract to which the consent of the parties is essential, and the marriage ceremony may be regarded either as a civil ceremony or as a religious sacrament, but the marriage relations shall only be entered into, maintained or abrogated as provided by law." Referring to the case of the State v. Walker, 36th Kansas, 297, we find in the syllabus this language: "The mutual present assent to immediate marriage by persons capable of assuming that relation is sufficient to constitute marriage at common law, and such marriage will be sustained in this state where its validity is directly drawn in question." Again, Section 241 of Chapter 100 of the General Statutes of 1897, reads as follows: "Every person having a husband or wife living, who shall marry another person, whether married or single, (except in the cases specified in the next section) shall, on conviction, be adjudged guilty of bigamy." Among the excepted cases specified in the "next section" (242) we find the following: "Where such former marriage was contracted by such persons while under the age of legal consent, the age of legal consent as intended by this act shall be of males fifteen and of females twelve years." Therefore we conclude that when the parties to the same are not related within the degrees prohibited, the civil contract of marriage and the marriage rela-

tion may be entered into by and become binding upon males at the age of fifteen and females at the age of twelve years. And so long as no further restrictions upon marriage exist courts should be very liberal in granting divorces. True, the number of divorces applied for and decrees rendered in this country is appalling, but the fault is not to be found in the laws controlling the courts in granting such divorces, nor in the courts themselves, but in the marriage laws of the land which permit persons of all grades, morally, mentally and socially, and of all ages from the cradle to the grave, to enter into the marriage contract and the marriage relation with practically no restrictions whatever.

In *Gibbs v. Gibbs*, 18th Kansas, page 420, Chief Justice Horton, speaking for the court says: "The writer of this opinion believes that the marriage contract is ~~one~~ which should be sundered only for causes that render its longer continuance destructive of social order, and never for reasons that make it merely an inconvenience to one of the parties." The writer of this paper desires to state that in his humble opinion marriages between persons of proper age and physical, mental and moral capacity, should be encouraged and not discouraged by the knowledge that if such marriage proves to be unfortunate relief for the parties only when not absolutely necessary for the preservation of social order will be denied, and if one of the contracting parties habitually neglects or wilfully disregards and violates the terms of the contract, the welfare and happiness of the injured and innocent party should be considered and the contract sundered. When its *dis*-continuance is not destructive of social order, and, to the innocent and injured party, relief should not be refused, nor even difficult to obtain.

Much more to our liking is the rule laid down in 30th Kansas, page 712, and especially as quoted in 33rd Kansas, page 1, which is as follows: "Any unjustifiable conduct on the part of the husband, which so grievously wounds the mental

feelings of the wife, or so utterly destroys her peace of mind as to seriously impair her bodily health or injure her life, or such as utterly destroys the legitimate ends or objects of matrimony constitutes extreme cruelty, although no physical or personal violence is inflicted or even threatened." It will be remembered that the husband or wife having alleged and proven extreme cruelty on the part of the other, is entitled to a decree of divorce. And the above defines some of the elements of "extreme cruelty" to the entire satisfaction of the writer.

To an educated and refined companion unkind words and acts, false and vulgar charges make deeper wounds than personal violence, the latter injuring the body, the former injuring both body and soul. To a loving and loveable companion, whose affections are never reciprocated, but wasted upon a base pretender without hope of divorce, physical violence producing death would be welcome as a relief. And to continue such unnatural union by force of law serves no good purpose to society, but tends to invite crime and to the production of offspring inferior mentally and morally, if not vicious and criminal. So varied is human nature that divorce courts should be hampered with few artificial rules but much should be left to the court's good judgment and discretion in each individual case. What might be gross neglect of duty or extreme cruelty in some cases, might, because of lower mental, moral and social standing in other cases, be very trifling matters indeed; hence the good or ill results of divorce proceedings must depend upon the court's ability to exercise his independent judgment, free from passion, prejudice or cowardice. True, the marriage contract is usually like earth, prior to the command, "Let there be light"—that is, "without form and void,"—but every such contract is presumed to contain the mutual covenant to love, and so long as both parties to the same have the capacity to comply with that covenant and honestly desire to do so, no decree of divorce will be sought or desired.

## THE BANKRUPTCY ACT OF 1898.

THOMAS B. WALL.

*[Read by Otto Eckstein.]*

The Constitution provides that Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States.

The provision gave rise to acrimonious debate in the Constitutional Convention, between those who were jealous of the rights of the individual states and those who were denominated Federalists. That such a provision was adopted is additional evidence of the great wisdom of those who framed the Constitution which with very few amendments has been demonstrated to be sufficient for the government of a population and a domain, the number and extent of which was hardly foreseen or even prophesied.

Insolvent laws in some form exist in nearly all the states, but with the more intimate business and commercial relations existing between the people of the different states and sections constantly increased by the improved facilities of transportation and communication, it has become important that there be a uniform system of insolvent laws throughout the United States. Moreover there is a growing sentiment in favor of uniformity in legislation by the several states on a great variety of subjects and much is being done in that direction. The states have the power of passing insolvent laws, but they cannot apply to citizens of other states having claims against the resident debtor, for the state has no jurisdiction over them, unless they voluntarily submit their claims to the

jurisdiction or participate in the distribution of the insolvent's assets; then again perhaps such laws cannot apply to contracts entered into before their enactment since they would impair the obligations of such contracts. The importance of legislation on the subject by the general government is most apparent. The National Bankruptcy Act is supreme; while perhaps it does not have the effect per force its adoption of repealing the state insolvent laws, yet it does suspend their operation and supersedes them.

The first National Bankruptcy Act was passed in 1800 and was to expire by limitation in five years, but was repealed in 1803; the second was the Act of 1841 and was repealed in 1843; the third was the Act of 1867 and was continued in force till 1878. It will be observed that this Act continued for a period of about eleven years, and the debates in Congress on the subject of its repeal show that it doubtless would have survived had it not been for the expensiveness of proceedings under it; the fourth and present Act was passed in 1898 and the objections found to its predecessor, the Act of 1867, that the costs were too burdensome cannot be urged against it. I believe the present Act will continue with some modifications for a long time and perhaps will survive the present generation of lawyers. The legal profession, credit men and business world may well prepare for its continued operation. The lawyer in general practice must familiarize himself with it, as for the present at least, it is an important part of our system of jurisprudence.

The processes of attachments, garnishments, etc., and assignment laws have practically fallen into disuse.

The Act was passed after much effort by its advocates and was attacked with much bitterness by its enemies, and many compromises and concessions were made by its friends but with a few needed amendments; when the profession and the credit men of the country are familiar with its various provisions and the effect of its operation, it will grow in favor

and any attempt to repeal it will be met with a formidable opposition.

Let us consider some of its principal features; naturally the tribunal and its jurisdiction first challenge attention.

The District Courts of the United States in the various states and territories are made Courts of Bankruptcy and invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings; the Act at great length specifies the powers thus conferred, and also contains the wise provision that the section giving or conferring jurisdiction shall not be construed to deprive a Court of Bankruptcy of any power it would possess were the certain specific powers not enumerated.

#### WHO MAY BECOME BANKRUPTS?

The next important feature of the law is, who may become bankrupts under the present Act? Perhaps this feature of the bill, when it was under consideration gave rise to more discussion than any other, but the contention finally prevailed that its benefits may be voluntarily had by all persons owing debts which they cannot pay in full, except a corporation. The day laborer and farmer as well as the operator in Wall Street may invoke its relief.

It will be observed that the Act fixes no amount of the indebtedness, hence all that is necessary is that the petitioner owe debts which he is unable to pay in full. Any person except a wage-earner or a person engaged chiefly in farming or in the tillage of the soil and any incorporated company and any corporation engaged principally in manufacture, trading, printing, publishing or mercantile pursuits, owing debts to the amount of one thousand dollars (\$1,000) or over, may be adjudged an involuntary bankrupt, if they owe debts which they cannot pay in full, or have committed acts of bankruptcy. Private bankers but not national banks or banks incorporated

under state or territorial laws may be adjudged involuntary bankrupts.

A moment's thought will commend the exceptions made. By a separate section provision is made for having a partnership adjudged a bankrupt, and under this provision the members of the firm may procure a discharge from partnership debts, but inasmuch as under the laws of this and most states the members of the firm are liable as individuals, they may be discharged from personal liability of both firm and private obligations. Dividends may be declared upon firm and individual assets, and ample provision is made for proper adjustment of all rights.

#### DEBTS PROVABLE.

Without enumerating the provisions of the law as to debts provable, suffice it to say that as a general rule every debt recoverable, either at law or in equity is provable in bankruptcy. An unliquidated claim against a bankrupt may, pursuant to an application to the Court of Bankruptcy, be liquidated in such a manner as it shall direct, and may thereafter be proved and allowed against the bankrupt's estate. Under the provision there is no doubt but a claim for damages for a tort such as assault, slander or deceit may be established against the bankrupt, if liquidated or reduced to a judgment before the bankrupt proceedings or afterwards, if liquidated or ascertained after application has been made to the Court of Bankruptcy and under direction of the court.

Under the provision as to debts not affected by discharge it will be noticed that judgments, debts of claims against the bankrupt arising for wilful or malicious injury to the person or property of another are not affected by a discharge of the bankrupt, and perhaps, as the law now stands a claimant might participate in dividends declared upon the estate of the bankrupt, and might thereafter enforce the balance of the claim against the bankrupt after his discharge, should he afterward acquire property subject to execution; it is sug-



gested that such a claimant should not be permitted to share with general creditors in a dividend as his claim is not affected by a discharge.

#### DEBTS WHICH HAVE PRIORITY.

The debts having priority, or which shall first be paid by the trustee, under the order of the court are (1) taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality; (2) costs of administration, attorney's fees; (3) wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of the proceeding, not to exceed three hundred dollars (\$300) to each claimant; (4) debts owing to any person, who by the laws of the state or United States is entitled to priority. The wisdom of these provisions can hardly be questioned and that which gives to workmen, clerks, and servants wages within three months before the bankrupt proceedings not to exceed three hundred dollars to each claimant, is surely commendable. That provision giving priority to debts owing to any person who by the laws of the state or United States is entitled to priority has not as yet been construed authoritatively, at least in its application to the many questions which will inevitably arise under it. Under the laws of Kansas there are no exemptions to a debtor for wages due a laborer, but it is doubtful, if under the provision of the bankrupt law the Court of Bankruptcy could require the payment of wages due the laborer out of the exempt property, and yet a discharge in bankruptcy would unquestionably prevent a laborer from enforcing his claim against the bankrupt, although under the state law he would hold no exemptions from such debts; it is safe to anticipate, and for that reason the suggestion is made, that there will be much contention as to the effect of the provision above referred to and many conflicting views.

#### DEBTS NOT AFFECTED BY DISCHARGE.

Section 17 of the Act is as follows: "A discharge in bank-

ruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) or judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by fraud, embezzlement, or defalcation while acting as an officer or in any fiduciary capacity."

It will be observed that obligations, debts or judgments created by the fraud of the bankrupt or by obtaining property by false pretenses and representations or for the wilful and malicious injuries to the person or property of another, or which were created by embezzlement, misappropriation or defalcation while acting as an officer in any fiduciary capacity, are not affected by a discharge. Attention to this is directed because credit men and merchants have made much complaint against the Bankruptcy Act under the apparent belief that one obtaining credit upon false property statements, representations or pretenses is discharged from liability when discharged in bankruptcy; this belief and sentiment has been so strong that a proposed amendment to the Act has been prepared by the Association of Credit Men. Such complaint and such amendment is unwarranted and unnecessary. There can be no question but if one obtains credit by misrepresentations, false pretense or any fraudulent device that a discharge does not discharge him from the debt or obligation thus created, and the claimant may participate in dividends declared upon the bankrupt's estate and may thereafter, notwithstanding the discharge of the bankrupt, recover his debt should the bankrupt acquire property subject to execution. The view is entertained that if the credit men, wholesale trade and mer-

chants understood the provision of the Act above quoted that much of the prejudice heretofore entertained by them against the law would be dissipated. The bankrupt who has wilfully and maliciously inflicted a personal injury upon another, or against his property, cannot escape liability therefor by procuring a discharge in bankruptcy; an executor or administrator, guardian or public official who is guilty of embezzlement, misappropriation or defalcation while in any fiduciary capacity is not discharged. It is evident that an agent or collector who embezzles the money of his employer is not released by a discharge. The section above quoted appears to be ample, and this as well as other provisions of the Act is not in any wise calculated to furnish protection and immunity to the scoundrel.

#### EXEMPTIONS.

The Act does not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the state. There has been some contention that the Bankruptcy Act is unconstitutional because of the provision pertaining to exemptions. The contention is that the Bankruptcy Law allowing exemptions to the bankrupt to the extent allowed by the laws of the state in which the adjudication is made is obnoxious to that clause of the Constitution which gives Congress power to establish uniform laws on the subject of bankruptcy. The position is not sound; a bankrupt law which by its terms is made applicable to all the states alike without distinction or discrimination is not unconstitutional merely because its operation may be wholly different in one state than in another; circumstances and conditions existing in the states are infinitely various, and no law which human ingenuity could devise would be uniform in the sense of operating equally in the various states with their different conditions and diversified interests. Upon an adjudication in bankruptcy the title of all the estate of the bankrupt vests at once in the

trustee, except that which is exempt to the bankrupt under the laws of the state where adjudication is properly had.

Questions of exemption arise under the operation of the Bankrupt Law just as they constantly arise under the state law, and Courts of Bankruptcy will be governed by the decisions of the state construing the exemption laws.

#### TRUSTEES.

The creditors at the first meeting after the adjudication may select a trustee of the estate of the bankrupt, and upon the qualification of the trustee he becomes at once vested with the title of the bankrupt, and entitled to the possession of all of his property of every kind whatsoever except that which is by law exempt; this includes, of course, all his books and documents relating to his property and property transferred by him in fraud of creditors.

The power of the trustee is ample and if properly exercised is well calculated to protect the interests of the creditors. In fact, the trustee is the representative of the creditors and is authorized and empowered to bring actions to recover and protect the assets of the estate and to bring actions to set aside fraudulent conveyances and to recover preferences which have been given by the bankrupt within four months prior to the adjudication. The trustee can bring and maintain any action which the creditor might have brought and maintained but for the bankruptcy proceeding. Creditors often unjustly complain of the Bankruptcy Act, believing that remedies are lost which they might otherwise invoke, but this complaint like many others, is unwarranted.

It is made the duty of the bankrupt to attend the first meeting of the creditors and any subsequent one, and may be compelled to give full information as to the condition of his affairs and his estate, and may be and often is under oath examined at great length before the referee; oftentimes he is

conducted on a piscatorial expedition more extensive than can be had under the state laws.

There has been much controversy as to the jurisdiction of United States and state courts as to actions brought against trustees. Section 23 of the Act is the section upon the subject. Many conflicting decisions and opinions have been expressed and rendered upon this subject, but the Supreme Court of the United States in the case of *Fred Bardes, Trustee, v. First National Bank of Hawarden*, has held that "United States district courts have no jurisdiction over independent suits brought by a trustee in bankruptcy to assert a title to money or property as assets of the bankrupt, against strangers to the bankruptcy proceedings, unless by consent of the proposed defendant, such jurisdiction being denied to them by Section 23 of the Bankruptcy Act of 1898."

At the same sitting of the court it was held in the case of *White v. Schloerb*, "Goods in actual possession of the bankrupt at the time of his adjudication as such that an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun."

#### THE EFFECT UPON CREDITS.

Under the general provisions referred to and the ample power of Courts of Bankruptcy to protect and preserve the assets of the bankrupt for the benefit of creditors, there can be no just criticism of objections that the Act has had the effect of preventing or discouraging the giving of credit, and the opinion is expressed that it has not had such effect. The prediction is made that it will have a salutary and beneficial effect upon the system of credit existing in the mercantile world, when the provisions of the Act are more thoroughly understood, and when certain questions are settled by author-

itative adjudication. The various state laws which give the debtor an unfair advantage or opportunity to defraud, or which give certain creditors undue advantage, have been rendered nugatory under the Bankruptcy Act. It is well known to the profession that heretofore the local creditor, and more often he is a banker, after the merchant or tradesman has procured credit from the wholesale merchant or jobber and has accumulated a full stock of goods to the very limit of his credit, files a chattel mortgage and takes possession, and thereafter the business is run in the name of and for the benefit of the local creditor or banker. This is no longer possible.

The controlling feature of the Bankruptcy Act is that all creditors shall share pro rata in the assets of the debtor who is unable to pay his creditors in full. The view is expressed that now greater security is felt by wholesale houses and credit men, owing to the fact that they no longer fear the local creditor or banker since he must take his chances with them. Under the old system it was common for the largest wholesale creditor to supply the merchant with most of his goods with the understanding that if his other and smaller creditors should give him trouble that he will on the first appearance of danger transfer his stock in trade to the principal creditor, which heretofore has had the effect of defeating the smaller creditors. Under the Bankruptcy Act this is no longer possible. The Bankruptcy Act abhors preferences, and this is and should be the distinguishing feature of any system of bankruptcy laws. Heretofore the large creditor has practically owned the debtor; large concerns or houses might swallow up the smaller ones by promising to give unusual credit on consideration of preferences. The home creditor, the financial banker, the wife, the maiden aunt or the aged relative can no longer collect one hundred cents on the dollar to the exclusion of the foreign or general creditor. It is easy to see that the effect of the Bankruptcy Act will be to reduce the number of failures, for merchants will be more careful in

the conduct of their business. The first attaching creditor can no longer rake in a debtor's assets at an inadequate price and then credit it upon his claim. We undertake to say that there are no disadvantages to creditors that did not exist before the Act became operative, but by virtue of the Act innumerable disadvantages have been removed. As time goes on and the practice becomes more settled the disadvantages now apparent will disappear.





## CONSTITUTION.

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ARTICLE 1. The name of the Association shall be The Bar Association of the State of Kansas.

ART. 2. The object of the Association shall be the elevation of the standard of professional learning and integrity, so as to inspire the greatest degree of respect for the efforts and influence of the bar in the administration of justice, and also to cultivate fraternal relations among its members.

ART. 3. The officers of the Association shall be a President, Vice-President, Secretary, Treasurer and an Executive Council of five members.

ART. 4. The President shall preside at all meetings of the Association, and shall open each annual meeting of the Association with an appropriate address. The Vice-President shall preside in the absence of the President; and in the absence of both, a president *pro tem.* may be elected by the meeting. The Secretary shall keep a record of all the proceedings of the Association, and conduct the correspondence of the Association.

ART. 5. The Treasurer shall keep an account of all funds of the Association. The Executive Council shall manage the affairs of the Association, subject to the Constitution and By-Laws.

ART. 6. A quorum for the transaction of business shall be twenty members.

ART. 7. No person shall be admitted to membership of this Association who is not a member of the Bar of the Supreme Court, and who has not been engaged in the regular practice of the law for one year next preceding his application for admission.

ART. 8. All applications for membership shall be referred to the Executive Council, who shall report the same to the

Association, with their recommendation thereon; and no person shall be admitted to membership except by a two-thirds vote of the members present. Each member shall pay an admission fee of five dollars, and annual dues of three dollars.

ART. 9. The annual meetings of the Association shall be held in January of each year, at the capital, at such time as the Executive Council fix. Thirty days' notice of the annual meeting shall be given by the Secretary. Special meetings may be called by the Executive Council, of which meetings thirty days' notice shall be given to the members by the Secretary.

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## BY-LAWS.

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SECTION 1. The Executive Council shall, on or before the first day of May of each year, designate such a number of members, not exceeding six, to prepare and deliver or read at the next annual meeting thereafter appropriate addresses or papers upon subjects chosen and assigned by the Council to each of said members, as may be so selected for such purpose.

SEC. 2. The order of exercises at each annual meeting shall be as follows:

1. Opening address by the President.
2. Consideration of applications for membership.
3. Reports of Secretary and Treasurer.
4. Report of Executive Council.
5. Reports of standing committees.
6. Reports of special committees.
7. Delivering and reading of addresses and papers.
8. Miscellaneous business.
9. Election of officers and delegates to American Bar Association.

SEC. 3. There shall be chosen by ballot, at each annual meeting, three members as delegates to American Bar Association for the ensuing year.

**SEC. 4.** All addresses delivered and papers read before the Association, the copy of which is furnished by the author, shall be lodged with the Secretary. The annual address of the President, the reports of committees, and all proceedings of the annual meeting, shall be printed; but no other address delivered or paper read shall be printed, except by order of the Executive Council.

**SEC. 5.** The terms of office of all officers elected at any annual meeting shall begin at the adjournment of such annual meeting, and end at the adjournment of the next annual meeting. And in case of any vacancy, the Executive Council shall appoint some member to fill the vacancy, who shall hold until his successor is elected.

**SEC. 6.** The Treasurer's accounts and reports shall be examined annually by the Executive Council before their presentation to the Association, and the Executive Council shall report the result of such examination of Treasurer's report and accounts to the Association at its annual meeting.

**SEC. 7.** The Executive Council shall cause to be printed such a number of copies of the proceedings of its annual meeting as it shall deem best, not exceeding one thousand copies, and shall distribute the same to members of the Association, and to such other persons, or associations, or societies, as they may deem prudent; and shall, with the proceedings of each annual meeting, print the roll of active and honorary members of the Association, and its Constitution and By-Laws.

**SEC. 8.** Every member of the Association shall pay to the Treasurer on or before the first day of May of each year, (after the year of his admission), annual dues of three dollars. All members who have not paid their annual dues on or before May 1 shall, within thirty days thereafter, be notified of this fact by the Treasurer and requested to forthwith comply with the requirements of this by-law.

**SEC. 9.** The Secretary shall keep a "general membership roll" on which shall appear in alphabetical order the name of

every member of the Association from its organization, with the date of his admission.

The Secretary shall also keep an "honorary membership roll" to be composed of those members who shall be specially designated for this honor, by resolution of the Association on the formal written recommendation of the Executive Council.

The Secretary shall also prepare on the first day of March in each year, the "roll of active members" of the Association for that year, which shall include only those who have paid to the Treasurer their Association dues for the preceding year and the new members by whom no dues are payable for that year.

SEC. 10. The Treasurer shall, twenty days before the first day of March in each year, notify all active members in arrears for the dues of the preceding year, that the roll of active members for the year, to be printed in the Annual Report of the proceedings, will be made up on that date, and that their names must be omitted from that published roll of active members, unless their delinquent dues have been paid.

SEC. 11. Only the active and honorary members of the Association shall be entitled to participate in the proceedings of the Association, or to a seat at its annual banquet.

SEC. 12. On the general membership roll opposite each name omitted from the active membership roll, shall be noted the reason for such omission—whether death, non-payment of dues, or personal request.

SEC. 13. Any member whose name has been omitted from the active membership roll for non-payment of dues, may have his name restored to such roll by the payment of the years' dues for which he is in arrears.

SEC. 14. The standing committees of the Association shall consist of the following:

Judiciary Committee—Five members.

Committee on Amendment of Laws—Five members.

Memorial Committee—Three members.

Committee on Legal Education and University Law School—Five members.

## PUBLISHED ROLL OF MEMBERS.

## HONORARY MEMBERS.

Hon. David J. Brewer.....	Washington, D. C.
Hon. Henry Wade Rogers.....	Chicago
Hon. Seymour D. Thompson.....	St. Louis
Hon. John W. Henry.....	Kansas City, Mo.
Hon. Nathaniel M. Hubbard.....	Iowa
Hon. P. S. Grosscup.....	Chicago
Hon. Samuel A. Kingman.....	Topeka
Hon. Thomas Ewing, Jr.*.....	New York City
Hon. L. D. Bailey*.....	Lawrence, Kan.

\*Deceased.

## ACTIVE MEMBERS.

Alden, H. L., Kansas City.	Bullen, B. T., Belleville.
Allen, S. H., Topeka.	Burgess, H. L., Olathe.
Austin, E. A., Topeka.	
Allen, W. S., Newton.	Campbell, M. T., Topeka.
Bergen, A., Topeka.	Clark, Geo. W., Topeka.
Berger, A. L., Kansas City.	Clarke, W. B., Kans. City, Mo.
Bird, W. A. S., Topeka.	Cornell, Geo. G., Alma.
Bone, H. J., Ashland.	Cliggitt, Morris, Pittsburg.
Bowman, C. S., Newton.	Cowles, W. H., Topeka.
Bucher Chas., Newton.	Curtis, C. H., Burlingame.
Brown, Milton, Topeka.	Coleman, C. C., Clay Center.
Burris, Jno. T., Olathe.	Cunningham, E. W., Emporia.
Boyle, L. C., Kansas City, Mo.	Calderhead, W. A., Marysville.
Brown, J. U., Hutchinson.	Campbell, P. P., Pittsburg.
Bond, T. L., Salina.	Clark, Ansel R., Sterling.
Benson, A. W., Ottawa.	Campbell, Altes H., Iola.
Benton, C. E., Fort Scott.	Codding, J. K., Westmoreland.
Bowman, Noah L., Garnett.	Cochran, F. P.,
Burdick, Wm. L., Lawrence.	Cottonwood Falls.
Brice, Harry, Cimarron.	
Branine, C. E., Newton.	Dana, A. W., Topeka.
Bowman, Harry C., Newton.	Dassler, C. F. W., Leavenworth.
Burch, R. A., Salina.	Doster, Frank, Topeka.
Branine, Ezra, Newton.	Dewey, T. E., Abilene.
Brown, C. L., Arkansas City.	Dillard, W. P., Fort Scott.
	Downey, Francis E., Topeka.

- Dean, J. S., Marion.  
Dillon, W. T., Belleville.  
Davis, J. W., Greensburg.  
Dooley, H. C., Coffeyville.  
Eagan, J. G., Chicago.  
Elliott, C. E., Wellington.  
Ellis, A. H., Beloit.  
Evans, W. F., Topeka.  
Evans, Clinton J., Topeka.  
Earhart, E. S., Kansas City.  
Eckstein, O. G., Wichita.  
Ferry, L. S., Topeka.  
Foster, F. H., Topeka.  
Freeman, Winfield, Kans. City.  
Frith, J. Harvey, Emporia.  
Foster, F. H., Parsons.  
Farrelly, H. P., Chanute.  
Freeman, C. E., Topeka.  
Garver, T. F., Topeka.  
Gleed, C. S., Topeka.  
Gleed, J. W., Topeka.  
Godard, A. A., Topeka.  
Graves, Chas. B., Emporia.  
Green, J. W., Lawrence.  
Grattan, G. F., McPherson.  
Guthrie, W. F., Atchison.  
Getty, Geo., Syracuse.  
Glass, W. S., Marysville.  
Gilbert, W. D., Atchison.  
Greene, A. L., Newton.  
Hamilton, Clad, Topeka.  
Hayden, Chas., Holton.  
Hayden, Sidney, Holton.  
Heizer, R. C., Osage City.  
Hessin, Jno. E., Manhattan.  
Hick, R. S., Westmoreland.  
Holt, W. G., Kansas City.  
Hopkins, Scott, Horton.  
Horton, A. H., Topeka.  
Huron, G. A., Topeka.  
Herrick, Jas. T., Wellington.  
Hurd, A. A., Topeka.  
Harvey, A. M., Topeka.  
Hazen, Z. T., Topeka.  
Hagan, Eugene, Topeka.  
Hobbs, B., Cripple Creek, Col.  
Harrison, T. W., Topeka.  
Houston, J. D., Wichita.  
Hamilton, J. D. M., Topeka.  
Herrick, R. T., Topeka.  
Higgins, W. E., Lawrence.  
Hooper, W. W., Leavenworth.  
Hanson, Jno. F., Lindsborg.  
Iams, Rezin, Clay Center.  
Jetmore, A. B., Topeka.  
Johnson, W. A., Garnett.  
Johnson, J. G., Garnett.  
Johnson, Frank O., McPherson.  
Johnston, W. A., Topeka.  
Jones, Howel, Topeka.  
Jackson, H. M., Atchison.  
Jones, John J., Chanute.  
Jackson, A. M., Leavenworth.  
Kelso, David, Leavenworth.  
Kimball, C. H., Parsons.  
Kimble, Sam, Manhattan.  
Kenna, E. D., Chicago.  
Larimer, J. B., Topeka.  
Lloyd, Ira E., Ellsworth.  
Loomis, N. H., Topeka.  
Lewis, C. A., Phillipsburg.  
Littlefield, W. Topeka.  
Lamb, G. H., Yates Center.  
Larimer, H. G., Topeka.  
Mason, H. F., Garden City.  
McAnamy, Ed. A., Kans. City.  
Martin, F. L., Hutchinson.  
McClure, J. R., Junction City.  
McFarland, E. A., Lincoln.  
McFarland, J. D., Topeka.  
Miller, O. L., Kansas City.  
Milliken, J. D., McPherson.  
Moore, McCabe, Kansas City.  
Mulvane, D. W., Topeka.

- Monroe, Lee, Hays City.  
 Moore, O. L., Abilene.  
 Milton, B. F., Dodge City.  
 Martin, John, Topeka.  
 Morris, R. E., Kansas City.  
 Miller, M. M., Topeka.  
 McBride, W. T., Wellington.  
 Myler, E. W., Burlingame.  
 Madison, E. H., Dodge City.  
 Moore, Crompton, Paola.  
 McMahon, Geo. E., Anthony.  
 Martin, D. H., Topeka.  
 McBride, W. H.,  
     Independence.  
 Overmyer, David, Topeka.  
 Osborn, S. J., Salina.  
 Peck, Geo. R., Chicago.  
 Perkins, L. H., Lawrence.  
 Pickering, I. O., Olathe.  
 Porter, Silas, Kansas City.  
 Pringle, J. T., Burlingame.  
 Parker, J. W., Olathe.  
 Perry, A., Troy.  
 Pollock, J. C., Winfield.  
 Page, H. Ward, Topeka.  
 Price, H. G., Burlingame,  
     Jewell City.  
 Quinton, E. S., Topeka.  
 Redden, A. L., Topeka.  
 Roark, W. S., Junction City.  
 Root, H. C., Topeka.  
 Ryan, T., Washington, D. C.  
 Riggs, S. A., Lawrence.  
 Rossington, W. H., Topeka.  
 Randolph, L. F., Nortonville.  
 Rigby, Isaac A., Concordia.  
 Ritchie, David, Salina.  
 Rager, T. F., Erie.  
 Reeder, Jas. H., Hays.  
 Rathbone, David, Hays.  
 Sedgwick, T. N., Parsons.  
 Slonecker, J. G., Topeka.  
 Sluss, H. C., Wichita.  
 Smith, Chas. Blood, Topeka.  
 Smith, C. W., Stockton.  
 Smith, Wm. R., Topeka.  
 Spencer, Chas. F., Topeka.  
 Stillwell, L., Erie.  
 Summerfield, M., Lawrence.  
 Simmons, Jno. S., Dighton.  
 Switzer, J. F., Topeka.  
 Saum, W. E., Wakeeney.  
 Stoker, Geo., E., Topeka.  
 Stackpole, H. W., Clay Center.  
 Simpson, M. P., McPherson.  
 Sapp, W. F., Galena.  
 Springer, Alvin R., Manhattan.  
 Smith, F. Dumont, Kinsley.  
 Smart, C. A., Ottawa.  
 Stavelly, J. H., Lyndon.  
 Thomson, Wm., Burlingame.  
 Turner, R. W., Mankato.  
 Valentine, D. M., Topeka.  
 Valentine, H. E., Topeka.  
 Vance, A. H., Topeka.  
 Vernon, W. H., Larned.  
 Vernon, W. H., Jr., Larned.  
 Waggener, B. P., Atchison.  
 Wall, T. B., Wichita.  
 Ware, E. F., Topeka.  
 Watkins, Albert, Topeka.  
 Wells, Abijah, Seneca.  
 White, T. J., Kansas City.  
 Whiteside, H., Hutchinson.  
 Williams, F. L., Clay Center.  
 Wheeler, Bennett R., Topeka.  
 Wood, O. J., Topeka.  
 Wells, Frank, Seneca.  
 Welch, R. B., Topeka.  
 Whitcomb, Geo. H., Topeka.  
 Wilson, Emera A., Belle Plaine.  
 Wulfekuhler, L. H.,  
     Leavenworth.

**MORTUARY ROLL****NAME AND DATE OF DEATH.**

Bailey, L. D.	.	.	.	.	Oct. 15, 1891
Campbell, A. B.	.	.	.	.	Dec. 20, 1897
Crozier, Robert.	.	.	.	.	Oct. 2, 1895
Douthitt, Wm. P.	.	.	.	.	Nov. 28, 1897
Everest, A. S.	.	.	.	.	Oct. 22, 1894
Ewing, Thos., Jr.	.	.	.	.	Jan. 21, 1896
Foster, C. G.	.	.	.	.	June 21, 1899
Green, H. T.	.	.	.	.	Mar. 10, 1886
Griffin, Chas. T.	.	.	.	.	Jan. 9, 1884
Greer, John P.	.	.	.	.	Nov. 28, 1889
Gillett, Almerin	.	.	.	.	May 15, 1896
Hamble, C. B.	.	.	.	.	June 14, 1894
Harris, Amos	.	.	.	.	Feb. 2, 1891
Holt, Joel	.	.	.	.	April 27, 1892
Humphrey, H. J.	.	.	.	.	Aug. 8, 1890
Hurd, T. A.	.	.	.	.	Feb. 22, 1899
Hallowell, J. R.	.	.	.	.	June 24, 1898
Johns, H. C.	.	.	.	.	May 24, 1894
Johnson, J. B.	.	.	.	.	May 18, 1899
Lewis, Ellis.	.	.	.	.	Aug. 12, 1897
Maltby, J. C.	.	.	.	.	April 27, 1893
McMath, E. A.	.	.	.	.	Aug. 29, 1898
Prescott, J. H.	.	.	.	.	July 5, 1891
Ritter, John N.	.	.	.	.	Feb. 8, 1896
Robinson, R. G.	.	.	.	.	April 18, 1898
Randolph, A. M. F.	.	.	.	.	Sept. 1, 1898
Scott, W. W.	.	.	.	.	May 31, 1890
Stillings, E.	.	.	.	.	Feb. 8, 1890
Stephens, N. T.	.	.	.	.	Dec. 29, 1884
Spilman, R. B.	.	.	.	.	Oct. 19, 1898
Thacher, S. O.	.	.	.	.	Aug. 11, 1895
Usher, John P.	.	.	.	.	April 13, 1889
Wagstaff, W. R.	.	.	.	.	Feb. 4, 1894
Webb, Leland J.	.	.	.	.	Feb. 21, 1893
Wise, Z. S.	.	.	.	.	Jan. 8, 1901
Wolfe, Eugene.	.	.	.	.	Feb. 19, 1899
Webb, W. C.	.	.	.	.	April 19, 1898







1886

1902

THE NINETEENTH  
ANNUAL MEETING  
OF THE

BAR ASSOCIATION  
OF THE  
STATE OF KANSAS.



HELD IN THE CITY OF  
TOPEKA, ♣ JANUARY  
30TH AND 31ST, 1902.

OFFICIAL  
STENOGRAPHIC  
REPORT.



# **PROCEEDINGS**

**OF THE NINETEENTH  
ANNUAL MEETING**

**OF THE**

## **BAR ASSOCIATION**

**OF THE**

### **STATE OF KANSAS.**

**HELD IN THE CITY OF TOPEKA  
JANUARY 30TH AND 31ST, 1902.**

**OFFICIAL STENOGRAPHIC REPORT.**

CLAY CENTER, KANSAS  
PRESS OF THE TIMES

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**OFFICERS FOR THE YEAR 1902.**

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President . . . . . B. F. MILTON  
Vice-President . . . . . J. G. SLONECKER  
Secretary . . . . . D. A. VALENTINE  
Treasurer . . . . . HOWEL JONES

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**Executive Council.**

C. W. SMITH, Chairman.  
Bennett R. Wheeler, T. N. Sedgwick,  
J. W. Adams, Rezin Iams.

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**Delegates to American Bar Association.**

Frank Doster, Silas Porter, L. H. Perkins.  
ALTERNATES—Charles Hayden, A. W. Benson, Lee Monroe.

**Judiciary Committee.**

J. O. POLLOCK, Chairman.  
David Overmyer, E. H. Madison, J. T. Pringle, J. S. Dean.

**Amendments to Laws.**

JAMES T. HERRICK, Chairman.  
J. U. Brown, O. J. Wood, H. F. Mason, P. P. Campbell.

**Legal Education and University Law School.**

J. G. GLEED, Chairman.  
Noah L. Bowman, John W. Davis, W. G. Holt, T. E. Dewey.

**Memorial Committee.**

G. H. LAMB, Chairman.  
F. L. Williams, Ira E. Lloyd.

**Membership Committee.**

C. A. SMART, Chairman.  
W. S. Roark, David Ritchie.

**Admission to the Bar.**

ABIJAH WELLS, Chairman.  
J. B. Larimer, Lee Monroe.

**Probate Courts.**

B. F. MILTON, Chairman.  
Sidney Hayden, J. W. Parker.

**Special Committee on Universal Congress of Lawyers and Jurists.**

J. G. SLONECKER, Chairman.  
Otto G. Eckstein, Charles Hayden,  
J. W. Green, Winfield Freeman.

**OFFICERS OF PREVIOUS YEARS.****1883-4.**

President, Albert H. Horton; Vice-President, N. T. Stephens; Secretary, W. H. Rossington; Treasurer, D. M. Valentine.

*Executive Council:* D. M. Valentine, chairman; James Humphrey, David Martin, J. H. Gillpatrick, Frank Doster.

**1885.**

President, Albert H. Horton; Vice-President, W. A. Johnston; Secretary, W. H. Rossington; Treasurer, D. M. Valentine.

*Executive Council:* D. M. Valentine, chairman; James Humphrey, David Martin, E. S. Torrance, L. Houk.

**1886.**

President, Albert H. Horton; Vice-President, E. S. Torrance; Secretary, John W. Day; Treasurer, D. M. Valentine.

*Executive Council:* W. A. Johnston, chairman; John Guthrie, A. W. Benson, M. B. Nicholson, John H. Mahan.

**1887.**

President, Solon O. Thatcher; Vice-President, Henry C. Sluss; Secretary, John W. Day; Treasurer, D. M. Valentine.

*Executive Council:* W. A. Johnston, Chairman; C. B. Graves, Robert Crozier, Geo. S. Green, T. F. Garver.

**1888.**

President, W. A. Johnston; Vice-President, Eugene F. Ware; Secretary, John W. Day; Treasurer, D. M. Valentine.

*Executive Council:* John Guthrie, chairman; S. B. Bradford, George J. Barker, J. W. Ady, J. H. Mahan.

**1889.**

President, John Guthrie; Vice-President, T. F. Garver; Secretary, Chas. S. Glead; Treasurer, D. M. Valentine.

*Executive Council:* B. F. Simpson, chairman; W. W. Scott, L. B. Kellogg, A. W. Benson, Chas. S. Hayden.

**1890**

President, Robert Crozier; Vice-President, Chas. B. Graves; Secretary, C. J. Brown; Treasurer, Howel Jones.

*Executive Council:* B. F. Simpson, chairman; John Guthrie, Case Broderick, W. W. Scott, R. M. Eaton.

**1891.**

President, D. M. Valentine; Vice-President, L. Houk; Secretary, C. J. Brown; Treasurer, Howel Jones.

*Executive Council:* T. F. Garver, chairman; E. W. Cunningham, M. B. Nicholson, J. R. McClure, W. P. Douthitt.



**1892.**

President, T. F. Garver; Vice-President, J. W. Green; Secretary, C. J. Brown; Treasurer, Howel Jones.

*Executive Council:* W. C. Webb, chairman; C. Angevine, E. W. Moore, Winfield Freeman, A. A. Harris.

**1893.**

President, James Humphrey; Vice-President, H. L. Alden; Secretary, C. J. Brown; Treasurer, Howel Jones.

*Executive Council:* J. D. Milliken, chairman; N. H. Loomis, A. H. Ellis, Sam Kimble, H. W. Gleason.

**1894.**

President, J. D. Milliken; Vice-President, F. L. Martin; Secretary, C. J. Brown; Treasurer, Howel Jones.

*Executive Council:* H. L. Alden, chairman; Sam Kimble, J. W. Green, T. L. Bond, E. W. Moore.

**1895.**

President, H. L. Alden; Vice-President, J. B. Larimer; Secretary, C. J. Brown; Treasurer, Howel Jones.

*Executive Council:* Sam Kimble, chairman; T. B. Wall, A. A. Godard, E. A. McFarland, J. D. McCleverty.

**1896.**

President, David Martin; Vice-President, Wm. Thomson; Secretary, C. J. Brown; Treasurer, Howel Jones.

*Executive Council:* A. A. Godard, chairman; T. B. Wall, W. R. Smith, M. B. Nicholson, John W. Day.

**1897.**

President, Wm. Thomson; Vice-President, S. H. Allen; Secretary, C. J. Brown; Treasurer, A. A. Godard.

*Executive Council:* C. C. Coleman, chairman; John W. Roberts, Lee Monroe, McCabe Moore, C. B. Graves.

**1898.**

President, S. H. Allen; Vice-President, C. C. Coleman; Secretary, C. J. Brown; Treasurer, A. A. Godard.

*Executive Council:* C. B. Graves, chairman; J. D. McFarland, Lee Monroe, L. C. Boyle, McCabe Moore.

**1899.**

President, C. C. Coleman; Vice-President, Sam Kimble; Secretary, C. J. Brown; Treasurer, Howel Jones.

*Executive Council:* Silas Porter, chairman; J. C. Postlethwaite, H. W. Cunningham, J. T. Pringle, J. W. Parker.

**1900.**

President, Sam Kimble; Vice-President, Silas Porter; Secretary, D. A. Valentine; Treasurer, Howel Jones.

*Executive Council:* B. F. Milton, Chairman; J. G. Slonecker, Sidney Hayden, W. E. Saum, John T. Burris.

**1901.**

President, Silas Porter; Vice-President, B. F. Milton; Secretary, D. A. Valentine; Treasurer, Howel Jones.

*Executive Council:* J. G. Slonecker, chairman; C. W. Smith, F. Dumont Smith, H. F. Mason, C. B. Graves.



# MINUTES

## OF THE

### NINETEENTH ANNUAL MEETING.

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*Topeka, Kan., January 30, 1902.*

The Nineteenth annual meeting of the Bar Association of the State of Kansas, was called to order at 11 o'clock a. m., in the Supreme Court room, President Silas Porter in the chair.

The reading of the minutes of the last annual meeting was dispensed with.

The Association proceeded immediately to business, as follows:

By the President: Our exercises begin with the consideration of applications for membership. Are there any applicants for membership?

By Mr. Slonecker, chairman of the Executive Council: The names of quite a number of applicants have been submitted to the Executive Council. The Council recommends for admission the following named persons:

*John H. Crain, Fort Scott.*

*Geo. A. Vanderveer, Hutchinson.*

*Ira K. Wells, Seneca.*

*W. T. McCarty, Emporia.*

*J. Mack Love, Arkansas City.*

*J. S. West, Kansas City.*

*T. A. Nofziger, Anthony.**Ralph H. Gaw, Topeka.**Clifford Histed, Topeka.**W. F. Schoch, Topeka.**H. O. Trinkle, LaCygne.**D. E. Palmer, Topeka.**J. E. Brooks, Sedan.**John W. Adams, Wichita.**Julia F. V. Harris, Wellington.**J. G. Hutchison, Emporia.**Lizzie S. Sheldon, Lawrence.**J. S. Hunt, Topeka.*

Respectfully submitted,

J. G. SLONECKER, Chairman.

By the President: Gentlemen of the Association, you have heard the report, what is your pleasure in regard to it?

By Mr. Slonecker: I move the report be accepted, and the ladies and gentlemen mentioned therein be elected members of the Association. The motion prevailed and the persons named were declared members of the Association.

By the President: The next order of business will be the report of the treasurer.

By Mr. Slonecker: We have the report of the treasurer, Mr. Jones, who is now in Washington. This report is made up to the 20th of January, and is as follows:

**TREASURER'S REPORT.***Topeka, Kan., January 20, 1902.*

To the Bar Association of the State of Kansas:

Your Treasurer begs leave to make the following report:

Amount on hand at date of last report, Jan. 15, 1901...	\$124.05
Amount received from dues of 1900.....	143.00
Amount received from dues of 1901.....	282.00
Amount received from admission fees.....	40.00
Amount of contributions made.....	63.00
Amount received from D. A. Valentine, dues and fees for 1901.....	281.00
<b>Total.....</b>	<b>\$933.05</b>
<b>Total expenditures.....</b>	<b>\$706.51</b>
<b>Balance on hand January 20, 1902.....</b>	<b>\$226.54</b>

Thirty members owe dues for 1900 and 1901.....	\$180
Forty-one members owe dues for 1901.....	123
Total.....	<u>\$303</u>

Respectfully submitted,

HOWEL JONES, Treasurer.

A motion that the report be received and placed on file was adopted.

By the President: The report of the Memorial Committee is next in order, and of which committee Mr. Smith is chairman.

By Charles Blood Smith: Mr. President, I have a report prepared but wish to show it to the other members of the committee for their approval before submitting it to the Association.

By the President: It may be passed then for the present.

By Mr. Perkins: In pursuance of the custom which has been in vogue for some time, I move the appointment by the President of five members of the Association as a committee for the purpose of presenting nominations for officers. The motion was adopted.

By the President: I will announce the names selected for this committee some time during the day.

Is there any other miscellaneous business that can be taken up at this time? If not, a motion to adjourn will be in order.

On motion the Association adjourned to meet at 2 o'clock p. m.

FIRST DAY—*Continued.**Afternoon Session, 2 o'clock.*

[NOTE.—The Supreme Court met in session at this hour. Chief Justice Doster enquired if there were any applicants for admission to the bar, whereupon Judge J. S. West presented the name of D. E. Rathbun, of Chautauqua county, and moved his admission. Thereupon Mr. Rathbun took the customary oath and was duly admitted to practice in the Supreme Court.

By Chief Justice Doster: Gentlemen of the Bar, I may be permitted at this time to make an announcement that will be of interest to you. As you are aware, the constitutional amendment authorized this court to sit in divisions. When the amendment went into effect concurrently with the cessation of the Court of Appeals, that court left such a large number of unfinished cases to which this court fell heir, as it were, that we felt under the necessity of exercising the authority conferred upon us by the constitutional amendment. This was not to our desire, nor is it now satisfactory to us any more than it is to the bar. We are glad to say to you now that the work of the Court has so far progressed, that we may soon be able to transact all the business of the Court before the full membership. Just when we are unable to tell definitely. We presume that by next October, after the summer vacation, we shall be able to have a submission of all cases to the full Court.

Mr. Bailiff, you may now adjourn court until tomorrow morning at half past 9 o'clock; which was accordingly done.]

By the President: The meeting will please come to order.

The President then delivered his annual address, which will be found in its proper place, following these minutes.

By the President: I wish to say that I realize the attendance at these annual meetings is never as large as it ought to be in Kansas with a bar like the Kansas bar. We all realize, too, that there are a great many lawyers in this state who

ought to be members of this Association who are not, and I am going to take the liberty, by virtue of my office, to appoint a committee of five persons to take into consideration the state and condition of the Association, because there ought to be some steps taken for the purpose of increasing the membership of the Association and the attendance at the annual meeting. I am going to appoint this committee of five, and will ask it to violate the unwritten law and hold, at least, one or two meetings, and to make a report at some time during this annual meeting—perhaps at the close of the session tomorrow afternoon. I think this is for the best interests of the Association, and I will, therefore, make the appointment. I will appoint on that committee, Mr. Garver, Mr. Kimble, Mr. Sidney Hayden, Mr. Eckstein and Mr. Green. I hope the committee will act upon this matter, take an active interest in it, and make their report tomorrow.

By the President: Is the Memorial Committee ready to report at this time?

By Charles Blood Smith: As chairman of this committee I submit the following report:

#### REPORT OF THE MEMORIAL COMMITTEE.

Since the last meeting of this Association, two of its oldest and most prominent members have died: Thomas P. Fenlon, died on February 3, 1901; David Martin died March 2, 1901.

Hon. Thomas P. Fenlon was one of the most notable citizens of the state of Kansas, remarkable alike in the political arena, in society and at the bar.

Coming from his native state of Pennsylvania to Kansas and the city of Leavenworth, he was for more than a quarter of a century closely identified with the legal and political history of Kansas and the country.

He several times represented his district in the legislature,

being once, regardless of party, unanimously elected speaker of the house of representatives.

At different times the candidate of a hopeless minority for congress, he charmed the masses with his matchless oratory.

He served again and again as the county attorney of Leavenworth county in earlier days, and as prosecutor and for the defense of criminal cases, and in the most important litigation he was conspicuous for more than forty years.

In youth pitted against and associated with the brightest members of a distinguished assemblage of lawyers, he rapidly forged to the front as a chief among advocates. Gifted with a full measure of the wit and eloquence of his countrymen, he possessed rare powers of assimilation, and gaining great knowledge of books and precedents, he soon became a lawyer and advocate of renown. For the defense in criminal cases, as shown in many of the greatest cases tried in this commonwealth, he was easily the leader of the Kansas bar. His courage, his ingenuity, his intrepidity, as well as his fertility in emergencies, and the undoubted honesty and candor of the man, gave him the greatest advantage with courts, commanded the respect of the greatest judges of the land and made him well nigh invincible before a jury. Quick to seize the salient point in his case, he pressed it with ardor to the end. Genial in temperment, generous, and the most cheery of companions, who has not sought his society and reaped a benefit from the inspiring association? A great reader, he had the pearls of expression and the richest gems of thought to be found in classic literature. He would have been a commanding figure on any stage. His store of anecdotes to aptly illustrate his thoughts and the cleverness of his witty utterances, how often have they set the table in a roar.

When the evil days came that he had no pleasure in them, when the landscape faded in his eye, he wore a wasting illness with signal fortitude, still compelling hope to troops of friends



that he would yet remain for years to come. To young attorneys he was ever a kindly adviser and a present help, while to older men of the profession he will remain a happy remembrance.

Hon. David Martin was born at Catawba, O., October 16, 1839. He came to the city of Atchison in this state as a young man and early acquired the respect and high regards of the citizens of Atchison county and of the state, which he retained during his life.

Although often elected to office, beginning early in life with that of justice of the peace and serving for many years with honor and distinction as the district judge of Atchison county, and finally presiding as Chief Justice of the Supreme Court of this state from April, 1895, until January, 1897, he was in no respect a politician. In a political convention he was as helpless as a child and was entirely devoid of all political judgment.

He was a very thorough lawyer, an able and upright judge, and a man of high character, ability and moral purposes. He was an astute lawyer, learned in all the technicalities of the law, and while he vigorously asserted the rights of his clients while at the bar, he was always upright, honest and faithful.

During the period of his presiding as Chief Justice of the Supreme Court of this state there were presented many cases of the gravest importance, affecting both political rights and property interests. As a judge he was always patient and ready to hear and fairly to consider the views of counsel in cases presented to him. His manners at the bar were slow and deliberate, and he possessed the faculty of impressing the court and his associates and opponents that he firmly believed in the principles that he was presenting and the rights of his clients. As a lawyer he was always faithful to the interests of

his clients. As a judge, absolutely honest, fair and upright. As a man charitable and kind.

Respectfully submitted,

CHAS. BLOOD SMITH,

O. G. ECKSTEIN,

J. H. GILLPATRICK,

Committee.

On motion of Mr. Coleman the report was adopted and ordered printed in the Proceedings.

By the President: On account of illness, Judge Milton writes that he will be unable to be present at this meeting of the Association. The next in order is the address of Governor Stanley, subject, "Pardons and Paroles".

Which address was delivered and will be found in its proper place following these minutes.

By the President: The report of the committee on Legal Education and State University Law School is next on the program. Is the committee ready to report?

By Mr. Switzer: I submit the following report for your consideration:

#### REPORT OF COMMITTEE ON LEGAL EDUCATION AND UNIVERSITY LAW SCHOOL.

*To the President and Gentlemen of The Kansas State Bar Association:*

It has come to be the general opinion among lawyers that the law school is the proper place to begin the study of law. The American Bar Association, through its standing committee on legal education, has this to say upon the subject:

"There is little, if any, dispute now as to the relative merit of education by means of law schools and that to be got by mere practical training or apprenticeship as an attorney's

clerk. Without disparagement of mere practical advantages, the verdict of the best informed is in favor of the schools.

The benefits which they offer are easily suggested, and are of the most superior kind. They afford the student an acquaintance with general principles, difficult, if not impossible, to be otherwise obtained; they serve to remove difficulties which are inherent in scientific and technical phraseology, and they, as a necessary consequence, furnish the student with the means for clear conception and accurate and precise expression. They familiarize him with leading cases, and the application of them to discussion. They give him the valuable habit of attention, teach him familiar maxims, and offer him the priceless opportunities which result from contact and generous emulation. They lead him readily to survey the law as a science, and imbue him with the principles of ethics as its true foundation. Disputing, reasoning, reading and discoursing become his constant exercise; he improves remarkably as he becomes acquainted with them, and obtains progress otherwise beyond his reach."

This embodies the opinion of the best legal talent of the country, and the more these views obtain, the more important to the public and the profession becomes the proper development and equipment of our law schools.

The school of Law at the State University at Lawrence is now twenty-five years old, and notwithstanding the scant equipment and encouragement furnished by the state, those in charge from its beginning have developed a law school that is a credit to the University and to the state, and it merits the earnest encouragement and assistance of this Association.

Your committees for the years 1900 and 1901 reported fully upon the condition and needs of the Law School and recommended that the Association assist so far as it was able in securing from the Legislature of the State of Kansas such appropriation as would result in the supply of the requirements of a first class law school, but notwithstanding the efforts of the committees and the Association, practically noth-

ing has been accomplished in the line of supplying the needs reported to this Association at its meetings in 1900 and 1901.

The quarters furnished the Law School are entirely inadequate. The school should have a separate building for its use. There are now one hundred seventy students enrolled, and there is no room large enough to accommodate the entire school as a lecture room. The library and reading room is crowded into a space twenty by sixty feet, and absolutely inadequate to accommodate the large number of students that must constantly use it. The library is too limited in scope and there are not duplicates of the more important books. Many thousands of dollars should be appropriated and expended for books in order to make the library commensurate with the demands of this large and growing school. The faculty should be increased so that a longer and more thorough course of instruction could be given in many branches of the law.

Your committee believes that provision should be made for a professor of pleading and practice who shall devote his entire time to work of that kind, taking charge of the exercises in pleading and practice, correct papers, and giving students advantage of instruction which shall be practical and permanent. This is the plan in many of the best equipped law schools, and we believe it to be an excellent one in reference to practical work and that by its adoption the school will be able to turn out men qualified to try cases without so many instances of defeated justice on account of mistakes in mere questions of practice. It has been well said that a Bench and Bar well trained in the methods of procedure will be better able to adapt those methods to the practical exigencies of business than men whose knowledge of technicalities is inadequate and who, therefore, are groping in confusion as to how the features of the system are to be properly employed.

It is claimed that the proof of this last proposition is easily to be found in the reports of English courts presided over by

judges of the most thorough technical training and having a Bar composed of thoroughly educated and experienced men, as compared with those of the courts of last resort in some of our states, where cases are tried by lawyers of all degrees of skill. In English courts very few questions of practice come before the courts of last resort, and the cases are almost invariably tried on important legal propositions, really determining the merits of the controversy, while in the courts of our states innumerable practice questions are constantly presented and considered and a large proportion of the cases are affirmed or reversed on points involving the skill of the lawyer in methods of practice rather than on the merits of the controversy presented for decision.

We do not mean to convey that instruction in pleading and practice is not a prominent feature of the Law School. In fact, all time is given it now that is possible under the present circumstances. If the present needs of the school are to be supplied, larger appropriations for its benefit must be secured, and therefore, your committee recommends that the members of the Association use their individual efforts to impress the members of the Legislature from their respective districts with the importance of such appropriation.

J. F. SWITZER, Chairman.

On motion the report was adopted and ordered printed.

By the President: Miscellaneous business is next in order. Is there any? There being no response, presumably there is none. Reports of standing committees. Are there any?

Mr. T. N. Sedgwick, through Secretary Valentine, made the following report as chairman of the Committee on Judiciary:

TOPEKA, Kan., Jan. 31, 1902.

*To the Kansas State Bar Association:*

GENTLEMEN: Your by-laws provide for a Committee on Judiciary, but it does not define the duties of such committee.

(b)

I will confess that I have a very indefinite idea of what the duties of the committee are supposed to be. During the past year, there has been no questions referred to the Judiciary Committee for consideration. There has been no meeting of the committee during the past year, nor has it transacted any business of any kind.

All of which is respectfully submitted.

T. N. SEDGWICK, Chairman.

By the President: The Chair will appoint Judge A. H. Horton, Justice Pollock and J. D. Milliken to call on and to escort Judge Hagerman to the meeting this evening.

By Mr. Perkins: Mr. President, I desire to introduce a resolution. The time has arrived when the best men and women should begin to think about the scientific prevention of crime. A resolution similar to the one I am about to offer has been adopted by twelve or fifteen of the eastern great cities. The resolution ought to be adopted and is as follows:

*Resolved*, That we are in favor of the establishment of a Psycho-Physical Laboratory in the Department of the Interior at Washington, for the collection of sociological, jurisprudential, and abnormal data, especially as found in institutions for the criminal, pauper, and defective classes, and in hospitals, and also as may be observed in schools and other institutions.

On motion the resolution was adopted.

By Mr. Monroe: I move that O. H. Dean of Kansas City, Mo., be elected an honorary member of this Association. The motion was seconded and unanimously carried.

By the President: As the Committee on Nominations I will appoint the following named gentlemen: L. H. Perkins, C. A. Smart, W. S. Roark, C. C. Coleman and W. R. Smith.

By Mr. Slonecker: At the last regular meeting of the Association there was a bill before it to regulate admissions to the bar. I think it ought to be brought before the next legis-

lature, and in order that it may not be overlooked, I will make a motion now that the bill relating to that subject, and which appears in the last annual printed Proceedings of the Association, be referred specially to the Committee on Amendments to Laws, which will be appointed at this meeting, with instructions to present the same at the next session of the legislature and urge its adoption. The motion was seconded and carried.

By Mr. Green: I have had some experience in this line. At the session of the legislature before the last, I think, a committee was appointed from this Association to go before the Judiciary Committee and advocate the passage of the bill. I was one of the committee. Possibly because I am more interested in the subject than any other. That year the Judiciary Committee did not even give outsiders an opportunity to appear, although I know they were requested to do so. It is going to take more than resolutions. It is going to take earnest work to get a bill through the House. Each member of the Association should appoint himself a committee of one to talk the matter up with the members of the legislature. I think we ought to prepare a bill and refer the same to the Supreme Court, and then say that the Supreme Court approves it, and then allow the court to fix the time for the admission of students,—for the time and term of study, etc., etc. I am in favor of the motion.

By Mr. Cunningham: I was a member of the committee charged with the preparing of the bill, although I did but very little of the work; but I came to the conclusion that the bill would have to be sugar coated before it would pass. I am certain that the gentlemen who will hereafter compose the Supreme Court will be glad to get rid of it. I am satisfied that the way suggested is the only way it will ever become a law.

By the President: I understand that this committee is a

standing one and is to be appointed by the next president. I think the suggestion was to leave it entirely with the Supreme Court.

By Mr. Adams: Three years ago I was a member of the Judiciary Committee of the House. My impression is that the bill referred to a term in the Law School, and a member of the committee suggested another provision of the bill. There was a very weak prosecution of the same. I believe if a very short bill was formulated and referred to the Supreme Court as suggested, it would be passed. But it certainly will require a very vigorous prosecution.

By Rezin Iams: I think requiring an applicant to attend a term in the Law School would be fatal.

By J. S. Dean: The last bill assumed a preliminary education—that a person have a decent education before he be admitted. It also provided for an examination by a committee appointed by the Supreme Court.

By Mr. Slonecker: Section six provided for the creation of an examination committee—that five members of the bar be appointed by the Supreme Court and that their term of office be for four years; that said board of examiners should meet twice at least each year at the Capital, and such other places as the Supreme Court should direct, for the examination of applicants for admission.

(Note. See page 27, Proceedings of the Bar Association, 1901., sections 6, 7, 8 and 9.)

By Mr. C. W. Smith: If the district judges of the state would do their duty the question would be settled. As it is now the applicant is admitted under such rules and regulations as the individual judge may establish.

By Mr. Wells: It strikes me that this is one of the most important question that will come before the Association, and there is now but little time to act upon it. In the past it



could hardly be said that it was a compliment for a man to have been admitted to the bar of Kansas. It seems to me the best thing to do would be to prepare a very short bill to take the place of all other laws on the subject, and for the purpose of giving this matter further consideration, I would move it be referred to a special committee of three to report at the conclusion of the regular program tomorrow afternoon, and that then final action be taken. The motion was seconded by Mr. Coleman and unanimously carried.

By the President: I will appoint as such committee of three on the question of admission to the bar to report tomorrow afternoon, Abijah Wells, S. H. Allen and C. W. Smith. On motion the Association adjourned to 7 o'clock p. m.

#### FIRST DAY.

*Evening Session, 7:30 o'clock.*

The Association met pursuant to adjournment and was favored with some choice selections by the Ad Astra male quartette of Topeka, after which the annual address was delivered by James Hagerman of St. Louis, Mo., general solicitor of the Missouri, Kansas & Texas Railway company. Title: "Lawyers and Bar Associations." It was of a very high order of excellence, and was well received by the Association.

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#### SECOND DAY.

*Morning Session, 10 o'clock, January 31, 1902.*

The Association met pursuant to adjournment, President Porter in the chair.

By the President: We will now listen to the address of Fred Dumont Smith of Kinsley, subject, "Assessment and Taxation," which address will be found in its proper place with other addresses following these minutes.

By the President: The Chair is informed that the student of the State University Law School who is to deliver the address next on the program has not yet arrived, but will be here this afternoon, to which time it will be passed. We will now have an address on "Probate Courts" by Sidney Hayden, of Holton, which address will be found in its proper place among other addresses following these minutes.

By Mr. Slonecker: Two or three years ago an address was delivered here on Probate Courts by Mr. Parker of Olathe, who went into details somewhat in regard to defects relating to Probate Courts, and which attracted much attention. When this topic was assigned to Mr. Hayden it was with the design that the Association take steps to advocate amendments to the laws and that some manifest abuses should be corrected. It is a great deal like the question that was before the Association yesterday in regard to the admission of applicants to the bar. There is a standing committee on Amendments to the Laws. I do not know whether the Constitution and By-Laws are any more definite in regard to this committee than they are in regard to the Judiciary committee, as stated in Mr. Sedgwick's report.

In order to bring the matter before the Association properly, I move that the paper read by Mr. Hayden this morning and that of Mr. Parker several years ago, be especially referred to the committee, and that they be presented to the next session of the legislature, and that the committee be instructed to take steps to see that the legislature considers the bill thus prepared by the committee.

The motion was carried.

By Sam Kimble: Some of you know that I have been a member of the Bar Association for many years—like Judge Green and some others, and appreciate the fact that we resolute and resolute. If there is one single subject that appeals to us it is the absolute chaos of the Probate Court. We have

our standing committees, and they still stand, and always will stand. We decide to appeal to the legislature and make a dignified appeal; but the legislative committees do not listen to much dignity. It is the fellows who get close to them in other ways that they listen to. The jurisdiction of Probate Courts is one of the matters referred to by Mr. Hayden in his address. Standing committees, standing and waiting at the doors of the legislature, take up the matters entrusted to them and talk directly opposite to the needs of legislation. The whole matter should be arranged, prepared before the Governor's message is prepared, and he asked to embody the subject in his message, and to especially mention and make suggestion on the subject of Probate Courts, property, qualifications of the Probate Judges, if you please. We insist on appealing to the legislature direct—let us appeal to the Executive office, and ask that the Governor formulate some such method and include it in his message.

By R. B. Welch: It appears to me that one reason why no particular interest is taken in such matters is that they are all referred to one general committee. It seems to me that we ought to have a special committee for this particular need, one that will investigate the matter and report the defects; not only that, but report a remedy, and then the Governor will be informed as to what the defects are and what the remedies. I would be in favor of referring this matter to, say, a committee of three, who will take such action as may be necessary to accomplish something—see the Governor, the Representatives and Senators from their districts, and see that it has a following in the legislature.

By Mr. Whiteside: I would observe that the state of Massachusetts a few years ago was confronted by the same proposition we now are. The probate law of that state was codified, and in my judgment, Massachusetts now has the most perfect probate law in the whole country.

By Mr. Iams: I think Brother Kimble sounded the key note. I therefore second the motion.

By Mr. Slonecker: I do not know but that the suggestion made by Mr. Welch is a good one.

By Sam Kimble: I have no desire to offer any motion and did not intend to. What I said was merely as a suggestion, and my idea was that it be referred. I would like to call attention to the fact that we could divide the question as suggested, then confer early with the Governor—a good while before hand, to secure his attention to the details of the particular matter.

By the President: I would like to say that there is a good deal of merit in the suggestion of Mr. Welch.

By Mr. Garver: I was going to say that we have never accomplished anything except through a special committee. I think there is great advantage in having a committee composed of gentlemen who have given special attention to the matters in hand. I would like to offer as a substitute that a committee of three be appointed, consisting of the President of the Association, Mr. Sidney Hayden and Mr. Parker.

By Mr. Welch: I would accept that as the motion.

By the President: The motion then stands now as the original motion by consent—that this matter be referred to a special committee consisting of the President of the Association, Sidney Hayden and Mr. Parker, with instructions to prepare and report a probate bill to the legislature, and to do everything in their power to secure its adoption.

On being put to vote the motion was unanimously carried.

By Mr. Garver: The special committee that was appointed yesterday to consider the good of the Association is prepared to report.

By the President: You may make such report.

By Mr. Garver: The committee will submit the following report:

*Mr. President and Members of the Kansas Bar Association:*

Your special committee appointed by the Chair, to consider and suggest means whereby the membership of the Association may be increased and its general interests advanced, beg leave to report, that after consulting together and advising with other members of the Association, they offer the following suggestions:

First. They believe that the practical operation of the by-law requiring the names of members who are delinquent on the first of March of each year, for the dues of the preceding year to be dropped from the printed roll, has in many instances operated against the interests of the Association, from the fact that some, perhaps oversensitive members, have taken offense at such action when their failure to pay dues has been a matter of oversight rather than refusal or inexcusable neglect. It is thought that there are no members of the Association who would wilfully continue in default of dues when a demand therefor is made in a more formal way than that heretofore adopted by mere postal card notification. It is therefore suggested, that hereafter, when members are notified to pay dues, that they be also notified that if remittance is not made within ten days, a draft for the sum due, will be made upon them; and if any member, after being so notified, shall fail to pay, then the treasurer should draw through the banks on such delinquent member for the amount due.

Second. As it frequently happens that the district courts of the state have their regular terms at the time of the annual meeting of the Association, and some of the district judges hold attorneys in their courts by refusing to adjourn over or to accommodate the trial of cases so that attorneys may attend the meeting, we suggest that as soon as the time for

the annual meeting is definitely fixed by the Executive Council, the chairman thereof, notify the several district judges of the state of the time of said meeting, and request that if it can be done without prejudice to the public business, the court be adjourned over such time, where any of the members of the bar of the court express a desire to attend the meeting, and to especially urge upon all the judges to attend in person, and to recommend to the lawyers of their courts the benefit of membership in this association.

Third. We suggest that the standing membership committee put itself in communication with former members who have dropped out, for the purpose of inducing them to renew their membership, and, also, that they, either directly or through local members, solicit membership from other reputable lawyers of the state who should unite with us.

T. F. GARVER.

SIDNEY HAYDEN.

SAM KIMBLE.

J. W. GREEN.

O. G. ECKSTEIN.

By Mr. Eckstein: We did not receive the printed Proceedings of the Bar Association until very recently. It is, or would be, a matter of gratification to us to read these papers while they are fresh in our minds. After a lapse of ten or eleven months we forget what was in them, but if we receive the report of the Bar Association within a reasonable time after adjournment these matters that have come up before the Association are fresh and are of much interest. In the American Bar Association it is a matter of a good deal of gratification to always receive the printed Proceedings within ninety days—this time about four months. I would suggest to the Executive Council that the Proceedings of this Association should be published within ninety days after adjournment; that a larger number than usual be printed, so that half a

dozen, at least, can be given to each of the district judges who may distribute them to members of the bar not members of the Association.

By the President: Heretofore the members who have delivered the addresses would not get them into the hands of the Secretary in time.

By Mr. Slonecker: Two years ago the gentleman who delivered the Annual Address took it away with him, and we did not get it. Another stated he had lost his notes and that address did not appear at all.

By Mr. Perkins: I move that the report of the special committee be adopted. Motion seconded.

Now, Mr. President, you will remember that Mr. Hagerman, in his admirable paper last night suggested that it looked as though a federation of lawyers would finally take place, and a feeling of good fellowship brought about in consequence thereof. The thought occurred to me, could we not go home from this meeting and talk up this idea of a lawyer's federation, and make the attempt to create local organizations something like the State Bar Association in our respective counties? I would suggest that we have a local bar day in each county.

By Mr. Eckstein: I will state that we organized a bar association at Wichita about two weeks ago, and that we had twenty-eight members present, I believe. We are going to arrange to have a banquet next month, and we are going to try to bring them in a body to Topeka to the next State Bar Association meeting.

By Mr. Huron: We have a bar association in Shawnee county. Our president has been dead three or four years, the secretary has disappeared. I used to be the treasurer. I had forgotten it until the matter was called to memory. However, it does seem to me that the lawyers ought to be glad to come together and organize local bar associations. We could help

and benefit each other greatly in a social way, and if the lawyers in the state were organized and would take up the same questions that are discussed before the State Bar Association there ought not to be such very great difficulty in getting the legislation that to us seems desirable, and that we have not succeeded in having enacted heretofore. The suggestion is sufficient, I think, to draw the attention of the members present to the great benefit of and necessity for primary and local organization. They ought to be formed in every county in the state and be kept alive.

By Mr. Coleman: If I understand it rightly, the question before the Association is the report of the special committee offered by Mr. Garver. Do I understand it correctly, that the adoption of this report would be in the nature of a change in the by-laws? The draft system, as suggested by Mr. Garver, might be all right, but at the same time several of the members would cease to be members of the State Bar Association very soon after its adoption. It was with the especial view of preventing that result that the by-law itself as it now stands was worked out and formulated by our former secretary, C. J. Brown—and it was regarded as automatic and self-acting—and that every member should remain a member unless turned out for cause. If he failed to pay his dues he still remained a member, but not an active member, but could get on the active roll by paying up his dues. I hope to see the by-law amended in that particular.

By the President: I understand the suggestion is in the nature of an amendment to the by-laws. Did the committee design to publish the names of all who have not paid? I understand the names of the active members shall be published but the publication of others is not prohibited.

By Mr. Slonecker: I was called out while Mr. Garver was reading his report. I want to call attention to the fact that



there have never been any duns sent out on postal cards that I know of. Receipts are always sent in that way. I do not think any year for five or six years the dues were as well paid up as they were last year. By reason of the fact we took in thirty-eight new members, which amounted to nearly two hundred dollars in money, which lifted us out of debt.

By the President: The motion is on the adoption of the report of Mr. Garver. Shall we adopt the report of the committee? The motion was carried and the report adopted.

On motion the Association adjourned to meet at 2 o'clock.

## SECOND DAY.

*Afternoon Session, 2 o'clock, January 31, 1902.*

By the President: Are there any reports of special committees to be made at this time?

By Mr. Justice Smith: I have here the report of the committee on nominations, and it is as follows:

President, B. F. Milton, Dodge City.

Vice-President, J. G. Slonecker, Topeka.

Secretary, D. A. Valentine, Clay Center.

Treasurer, Howel Jones, Topeka.

Executive Council: Chairman, C. W. Smith, Stockton; Bennett R. Wheeler, Topeka; T. N. Sedgwick, Parsons; J. W. Adams, Wichita; Rezin Iams, Clay Center.

Delegates to American Bar Association: Frank Doster, Marion; Silas Porter, Kansas City; L. H. Perkins, Lawrence.

Alternates: Charles Hayden, Holton; A. W. Benson, Ottawa; Lee Monroe, Hays City.

A motion that the report be received and adopted, and that the gentlemen named be declared elected to the respective offices, was seconded and carried unanimously.

By the President: We will now listen to a paper entitled, "May a School Board of a Public High School in the State of Kansas Require a Pupil to Take Elocution Contrary to the Expressed Wishes of the Parent," by A. L. Billings, of Cherryvale, Montgomery County, a member of the senior class of the State University Law School, which address will be found in its proper place following these minutes.

By the President: Is there a report of any committee to be made at this time?

By Mr. Clark: I desire to make the following report for the Membership committee:

*To the State Bar Association:*

The Membership committee, by way of report, desires to make the following recommendations, and asks their adoption by the Association:

1. That a copy of the Proceedings of this meeting be sent to every law office in Kansas.

2. That at the next annual meeting one session be devoted to reminiscences of the Association, and an effort be made to procure the attendance of as many as possible of the charter members of the Association. It might be called "Founders' Day".

3. That the time of the meeting be changed to the third Wednesday in December.

4. That each district judge in Kansas be requested to ask the members of the bar in each county in his district, at the term of court next preceding the annual meeting of the Association, to meet informally and select one or more of their number to represent them at the annual meeting.

GEORGE W. CLARK.

T. E. DEWEY.

W. H. VERNON, JR.

By Mr. Clark: Mr. President, I move its adoption.

By Mr. Eckstein: I desire to call attention to Article 9 of the Constitution for the fixing of the time for the holding of our annual meeting. I think this should be changed to the third Wednesday in December on account of the Kansas Day meeting, which so many lawyers attend and who are obliged to leave the city before the meeting of this Association. The two are so close together.

By Mr. Monroe: I believe it would be a mistake to change the time of the meetings of the Association. We always have a better attendance when the legislature is in session, and I believe that next year, in January, we will have double the number of attorneys in attendance we have this year. I am therefore opposed to the proposed change.

By Mr. Roark: It has seemed to me for three or four years that it was not best to have the Bar Association meeting so nearly in conjunction with the Kansas Day banquet, blow-out or doings, which has become a largely attended fixture in Republican politics, and it is often difficult for a lawyer to leave his business for three or four days in succession. It would seem to me it were better not to meet so nearly in conjunction with the Kansas Day meeting. I know Judge Osborn and Judge Smart were obliged to go back to their businesses on account of having been here at the Kansas Day meeting. It seems to me we should take some practical measure for the promotion of the attendance at the meetings of this Association.

By R. B. Welch: I heard the report of the committee and it does not meet with my approval. I had anticipated a good treat from Brother Hessin on the "Loves of the Lawyer," and am disappointed over his absence. I think if the old heads of the bar could tell about their early reminiscences it would be a good thing and very interesting. We cannot, however, have it except in January. Of course, the constitution could be changed in fifteen or twenty minutes.

A motion was made to strike out the recommendation of the committee that the time for the meetings of the State Bar Association be changed from January to December, which was seconded, and upon being put was carried. After which the report as amended, was adopted.

By the President: There was a committee appointed yesterday on regulations pertaining to the admission of applicants to the bar. I would say that the committee is unanimous in the matter of their report on admission of candidates to the bar, and that it should be presented to the next legislature in such manner as would secure the repeal of the present law on the subject, and place the jurisdiction of the matter with the Supreme Court. The committee has considered it fully and recommend the adoption of the report which follows:

We, your committee, to whom was referred the resolution in regard to the proposed amendment to the law of the state regarding admissions to the bar, beg leave to recommend the adoption of the following resolution as a substitute for the one now before the Association:

*Resolved*, That in the judgment of this Association the existing law in relation to admission to the bar to the several courts of the state should be repealed, and in the place thereof a law should be enacted giving the Supreme Court of the state exclusive jurisdiction of this subject under such rules and regulations as they may see fit to adopt,

*Resolved*, That a committee of three be appointed by the Chair charged with the especial duty of seeing that this matter is properly presented to the next legislature and favorable action secured thereon.

Respectfully submitted.

ABIJAH WELLS.  
C. W. SMITH.  
S. H. ALLEN.

On proper motion the report of the committee was seconded and carried without dissent.

By Mr. Perkins: Now, in pursuance of the discussion which took place this morning, the following was worked out:

WHEREAS, The usefulness and power of the legal profession would be enhanced by a more intimate and fraternal intercourse of the members of the bar, in associations formed for the cultivation of the best qualities of mind and heart, and

- WHEREAS, There seems to be a growing sentiment in favor of a federation of bar associations reaching from cities and counties to the state and nation; therefore,

*Resolved*, This Association recommends the organization of local city and county bar associations throughout this state, and recommends the members of this Association to take the initiative in the formation of such associations. It is further recommended that such local bar associations formulate constitutions and by-laws expressive of the high purposes for which they are formed, and that this Association recognize such local associations within its jurisdiction and invite the annual election by each local association of three delegates, members of this Association, to be their accredited representatives at the annual meeting of the Bar Association of the State of Kansas.

On motion the foregoing resolution was unanimously adopted.

By Mr. Eckstein: I offer the following resolution and move its adoption.

WHEREAS, It has been determined to hold an "Universal Congress of Lawyers and Jurists of the World" in the city of St. Louis, Mo., in connection with the Louisiana Purchase Centennial celebration under the auspices of the Louisiana Purchase Exposition Company, and with the co-operation of the American Bar Association and the Bar Association of the city of St. Louis; and

WHEREAS, The American Bar Association, at its last annual meeting in Denver, approved and endorsed the holding of such congress, and has appointed a special committee composed of one member from each state and territory in the Union, including the District of Columbia, to co-operate with the authorities of the said Exposition Company in bringing about such congress, and has further directed its executive

committee to take all necessary and appropriate steps to promote and carry out the plan of holding such congress; and

**WHEREAS**, The Bar Association of St. Louis has approved and commended the action of the Exposition Company and the American Bar Association, and pledged itself and its members to do all within their power to assist in making said congress a pronounced success, and appointed a special committee of nine members to co-operate with the committees representing the Exposition Company, the American Bar Association and with the National Commission of the Louisiana Centennial, and clothed its executive committee with full power to take all necessary and appropriate steps to promote and carry out the holding of said congress, and also the holding of the annual meeting of the American Bar Association in St. Louis during the Exposition; now, therefore, be it

*Resolved*, By the Bar Association of the State of Kansas that we cordially approve, commend and endorse the holding of such "Universal Congress of Lawyers and Jurists," and hold ourselves ready to do all within our power to contribute to the success of this great educational event, so full of interest to the lawyers and jurists of the world.

*Resolved*, also, That a special committee of five members of this Association be appointed by the President, to be known as Special Committee on the "Universal Congress of Lawyers and Jurists," to consider all matters appertaining to this subject; and

*Resolved*, further, That said special committee and the Executive Council of this Association be authorized to take all necessary and appropriate steps to assist in promoting and carrying out the holding of such congress, and also the holding of the annual meeting of the American Bar Association in St. Louis during the Exposition.

*Resolved*, further, That copies of these resolutions be transmitted to the Louisiana Purchase Exposition Company, the American Bar Association and the Bar Association of the city of St. Louis, and that when the committee provided for herein shall be appointed, the names and addresses of the members thereof, as well as those of the Executive Council, shall be sent to them.

The motion was duly seconded and unanimously carried.

By Mr. Mason: I have been requested to make a motion that the little paper or magazine or pamphlet, that was scattered here yesterday, and which most, if not all of you have seen, and which bears the title of *Obiter Dicta*, be declared the official organ of the Association, and in accordance with the request I make the motion.

The motion was seconded.

By Mr. Garver: I do not think we should recognize this as an official paper.

By Mr. Slonecker: I do not know that I would have any serious objection, but I do not think this either the time or place for such action.

By Mr. Roark: I do not think we ought to recognize it as an official organ of this Association. I am a friend to the Law School and have been a patron of it. This pamphlet is not edited by a member of this Association, and I do not think we should commit ourselves to it. It might lead us into embarrassment.

By the President: I am in doubt whether anything of this kind is wanted, but perhaps it is.

By Mr. Eckstein: I agree with Judge Garver that it would hardly be the proper thing to recognize it as an official organ and as a substitute, therefor, offer the following:

*Resolved*, That the periodical known as the *Obiter Dicta* be recommended to the members of this Bar Association for their financial and moral support.

By Mr. Mason: I accept the substitute.

By Mr. Clark: I am in favor of Mr. Eckstein's substitute.

By Mr. Larimer: I should like to enquire as a matter of personal privilege, by whom is this publication managed?

By the President: I declare this whole matter out of order.

By Mr. Wells: I understand the chairman of this Association, B. F. Milton, is not here, and will not be at this session. I, therefore, think the present chairman should name the various special committees heretofore provided for, and will therefore make a motion to that effect. The motion was seconded and carried.

On motion it was ordered that all the addresses of this session be published in the printed Proceedings of the Association.

By the President: I will appoint on the committee relating to the admission of applicants to the bar, Abijah Wells, J. B. Larimer and Lee Monroe.

I will appoint under the resolution heretofore adopted, a committee of five members of this Association to be known as a Special Committee on the "Universal Congress of Lawyers and Jurists" to be held in the city of St. Louis, Mo., and to consider all matters appertaining to this subject, the following named gentlemen: J. G. Slonecker, Topeka; Otto G. Eckstein, Wichita; Charles Hayden, Holton; J. W. Green, Lawrence, and Winfield Freeman, Kansas City, Kan.

On motion the Association adjourned sine die.

D. A. VALENTINE, Secretary.

In due time President B. F. Milton submitted his list of standing committee as follows:

#### **JUDICIARY COMMITTEE.**

**J. O. POLLOCK, Chairman.**

David Overmyer, E. H. Madison, J. T. Pringle, J. S. Dean.

#### **AMENDMENTS TO LAWS.**

**JAMES T. HERRICK, Chairman.**

J. U. Brown, O. J. Wood, H. F. Mason, P. P. Campbell.

#### **LEGAL EDUCATION AND UNIVERSITY LAW SCHOOL.**

**J. W. GLEED, Chairman.**

Noah L. Bowman, John W. Davis, W. G. Holt, T. E. Dewey.



**F. L. Williams,**

**Ira E. Lloyd.**

**W. S. Roark.**

**David Ritchie.**

For the purpose of preservation the Secretary here inserts the list of toasts:

**"Do as adversaries do in law—strive  
Mightily, but eat and drink as friends"**

*Liberty—License.....J. D. Houston*

*The Lady or the—Law.....Albert Watkins*

Some follow law, and some with beauty side."

*The Lawyer of the Future..... Otto B. Eckstein*

**"Othello's occupation's gone."**

*Some Kansas Lawyers.....* { *H. F. Mason*  
*R. B. Welch*

**"We'll think of all the friends we know,  
And drink to all worth drinking to."**

*Stickers and Knockers*.....\* { *Davia Overmyer*  
*Clad Hamilton*

Two little Indians started on a run.

One stubbed his toe—then there was one.

**"To sleep; perchance to dream; aye, there's the rub."**

\*In the absence of Judges McBride and Lobdell, Mr. David Overmyer and Mr. Olad Hamilton responded to the toast as stated.



## ADDRESSES.

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### PRESIDENT'S ANNUAL ADDRESS.

SILAS PORTER.

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#### "TAXATION OF FRANCHISES."

Since the days when Cyrenius was governor of the Roman Province of Judea, and "there went out a decree from Cæsar Augustus that all the world should be taxed," the question of taxation has been an ever present and a vexing one—a question which wise men and professors of political economy have seen fit to divide and sub-divide, and about which they have formulated a number of very dry and uninteresting axioms proving or assuming, among other things, that every form of taxation is either a tax on rent, wages, or profits.

In the meanwhile the world has groaned under the burden of taxation, wars have been fought on account of it, and everybody everywhere dislikes the very mention of the subject; most men seem not averse to escaping from payment on any kind of terms, and some are accused of resorting to deception and concealment in order to evade the payment.

The greatest difficulty has always and everywhere been experienced in the assessment of the intangibles.

Within a generation vast fortunes have been made and vast wealth has been invested in the capitalization of joint stock

companies, engaged in supplying or furnishing public utilities, —*quasi* public corporations, in which the public is directly interested as a user of the thing supplied. Such a corporation secures usually by municipal ordinances a right or franchise to furnish the inhabitants of a city water, light, or power, or means of communication or transportation within the city for a period of years. In most cases coupled with the franchise is the right to use portions of the public streets to carry on the business. As the population of the city increases this right or contract becomes more and more a thing of value. In many instances the company owning the franchise builds up by the aid of fortuitous circumstances a practical monopoly of an ever increasing business. This franchise, although an intangible thing, is property—personal property, oftentimes of immense value.

How shall it be taxed in fairness to its owner and in justice to the States? To value it higher than other forms of property, that is, at a rate of valuation higher in proportion to its actual value than other forms of property, would be confiscation. Local prejudice growing out of complaints on account of the kind or quality of public service rendered ought not to be permitted to affect the valuation. Clearly the franchise enjoyed ought to be valued in the same manner as other forms of property are valued for purposes of taxation.

Mr. Cooley in his work on taxation fifteen years ago thought that a tax on a corporation franchise might or might not be a just or wise thing. He argued that if the business is one of which the corporations have a monopoly, a tax on their franchise however heavy would not be burdensome, because in the end the community at large would pay it in the increased cost of the service. On the other hand, he thought it ought not to be taxed if the business in which the company was engaged was open to competition by individuals, such for instance as a trading corporation with an individual competi-

tor engaged in the same business, because it seemed unreasonable to give the individual an advantage in competition.

The question of the taxation of franchises cannot be said to be a new question, but it is receiving more attention at present than it has in the past. In the case of *San Jose Gas Co. vs.* January, 57 Cal., 614, it was held to be a part of the fundamental law of the state that corporation franchises are property, and may be taxed in some method in proportion to value.

There are manifestly two kinds of a tax on franchises. One, is a tax in the form of a percentage upon the capital stock of a company laid upon the right which the corporation has to exist as a corporation. This is somewhat in the nature of a privilege or license tax and applies to all forms of corporations organized for profit. Such is the New York franchise tax provided for by a recent act of assembly. But aside from this nominal franchise tax the claim is made that these public or *quasi* public service corporations stand upon a different footing and their franchise should be taxed as property itself. The Supreme Court of Illinois by a recent decision has made an important contribution to the law of the taxation of franchises. In this case the court lays down the rule as to the proper method of determining the value of the franchise of a public utility corporation; but the importance of the decision lies in the fact that the court goes further than courts have heretofore gone in the direction of controlling by mandamus the action of assessors and boards of review.

The Illinois legislature a few years ago created a state board of assessment and review, which supercedes the old state board of equalization, and to which many additional powers were granted. Complaints, however, have been made ever since the new law went into operation, that the officers comprising the board were as much susceptible to local influence and especially to the influence of the agents of wealthy cor-

porations as were the local assessors and the board of equalization under the old law. There has been, it is true, a remarkable increase in the returns and the valuation of all forms of personal property, but there has been experienced the same difficulty as before with reference to the intangible property of wealthy corporations.

It seems that the constitution of Illinois provides in a general way that the legislature "shall have the power to tax persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

So that as long ago as 1870 when the constitution was adopted Illinois began to make provisions for the taxation of franchises. By an act passed in 1899 the legislature of that state required that the capital stock of all companies, "shall be so valued by the state board of equalization as to ascertain and determine respectively the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company," and that the board shall adopt such rules and principles for ascertaining the fair cash value of such capital stock, as to it may seem equitable and just, and that such rules when so adopted, if not inconsistent with the act, shall be as binding as if contained in the act, subject to change or alteration or amendment by said board. The act also contains a provision that the shares of capital stock of such companies shall not be assessed or taxed in the state, that is, to the shareholders.

One Catherine Goggin, a schoolmistress of the city of Chicago, induced the state's attorney of Sangamon county where the state capitol is situated to file a petition in the Circuit Court of that county for a writ of mandamus against the state board of equalization and the members thereof to coerce said board forthwith to value and assess, in the manner provided by law the capital stock, including the franchises of thirteen

public-service corporations. In the corporations named there was a gas-light company, a telephone company, an electric light company, and ten street railway companies. The petition alleged that they were all located in and had tangible and intangible property subject to assessment and taxation in Cook County, Illinois; that the fair cash value of the capital stock including franchises of said corporations, over and above the assessed value of their tangible property aggregated the sum of \$235,000,000, and that said board and the members thereof had refused to value and assess said capital stock including franchises as provided by law and intended as heretofore not to value or assess said capital stock including the franchises upon a basis of fair cash value thereof. The trial was had before the court and a judgment rendered against the respondents, awarding the writ as prayed for.

On appeal it was contended that the action and judgment of the state board of equalization with respect to the existence or value of the property of the corporations in question was not subject to review by the court. It was also contended that the respondents were not in default at the time the petition was filed; that the state board of equalization was then in session and had the entire session in which to make the assessment in question, and that the petition for mandamus was therefore prematurely filed. It was also contended that the court should have declined to grant the writ because it appeared at the hearing that the state board of equalization had adjourned its annual session, and that the writ would be wholly without results as the court would be powerless to enforce obedience thereto.

Here was a suit brought in the name of the state upon the relations of an individual who started out as a reformer to discover why it was that the public schools of the city of Chicago were compelled to close several months too soon each year on

account of the deficiency of the taxes levied for school purposes.

The petitioners contended that the board had failed to assess some of the thirteen corporations in any sum whatever upon their capital stock and franchises, and that as to seven of said corporations at an amount so low as to amount in law to a fraudulent valuation and assessment and therefore to no assessment at all.

Some of the school teachers of Chicago formed an association known as the Chicago Teachers' Federation, and prior to the commencement of the suit addressed a communication to the state board of equalization presenting to the board a memorandum of information compiled by a committee. The communication set out that a large number of corporations, naming them, paid no taxes on capital stock for last year and requested the board to value and assess the capital stock and franchises of said companies in the manner provided by law.

It appeared in evidence that the said Catherine Goggin as a representative of the Chicago Teachers' Federation had frequently pointed out to the board that the assessment of said corporations as made for previous years permitted said corporations to escape taxation on their capital stock and franchises and urged upon the board that the same be assessed for the current year. It appeared further that the relators had collected and offered for submission to the state board information with reference to the value of the capital stock and franchises of said corporations.

The court said "We have repeatedly held that an assessment may be impeached on the ground that property has been fraudulently assessed at too high a rate." And in the case of *Hotel Co. vs. Lieb*, 83 Ill., 602, the same court had held that where the valuation is so grossly out of the way as to show that the assessor could not have been honest in his valuation it is accepted as evidence of a fraud upon his part against the



taxpayer, and the court will interpose. This case was cited and also the case of *Railroad Co. vs. Cole*, 75 Ill., 591, where it was held that "Valuations must be the result of honest judgment, and not of mere will," and the court says, "The converse of the proposition must be true, and an assessment may be impeached where the assessment has been fraudulently made at too low a rate."

The Supreme Court held that the state board of equalization in assessing the capital stock and franchises of corporations does not act as a board of review, but as an original assessor, and the duty resting upon said board to value and assess the fair cash value of the capital stock including the franchises, when omitted or evaded may be enforced by mandamus.

The court apparently brushes aside the theory that because the state board of equalization in fixing the value of corporate property for the purpose of taxation is *quasi* judicial in its nature, its action may not be subject to mandamus. And they say "when it is apparent to the court that every well-known rule for the valuation of capital stock, including franchises, has been violated and arbitrarily disregarded by the board, and such board has refused to consider the statements as to values prepared by the assessors, under the statute, for its use, and has refused to consider information as to the value of such corporate property submitted to it by interested parties, and has arbitrarily fixed such assessments at a grossly inadequate sum under rules passed by it for the occasion, the court is justified in holding that fraud in the making of such assessments has been established, and such pretended assessments may be properly disregarded and treated as no assessments, and such board be coerced by the writ of mandamus to assess such property.

The court held that where the duty sought to be enforced is of a public nature, affecting the people at large, and there is no one especially empowered to demand its performance,

there is no necessity for a demand and a refusal. The law requiring the duty stands as a continual demand, and that the duty being a continual one may be enforced against the officers generally and their successors.

The court also approves the action of the trial court in declaring what was a proper rule and method for the board of equalization to use in estimating the value of the capital stock and franchises of such corporations. The rule which they approve as stated by the trial court is as follows:

"The court holds that in making the assessment of the capital stock of corporations, including the franchise, it is proper for the board to add the market or fair cash value of the shares of stock, and the market or fair cash value of the debt of the corporation, excluding the indebtedness for current expenses, and to take the aggregate amount so ascertained as the fair cash value of the capital stock, including the franchise, and to take therefrom the equalized or assessed valuation of the tangible property of the corporation, and one-fifth of the remainder would be the net assessed valuation of the capital stock of such corporation, including the franchise, over and above the assessment of its tangible property." Under the Illinois tax laws property is assessed at one-fifth its actual value.

It appeared in evidence that after the mandamus proceedings were commenced and before the hearing the state board of equalization sought to change its rule for the valuation of the capital stock and franchises of such corporations and adopted a new rule providing that the capital stock of such companies should be valued as an entirety, "due consideration being given to the following propositions: First, to the character and duration of the franchise of said company. Second, to the amount of the contribution, (if any) demanded of and paid by said company, under the provisions of any contract or ordinance, to any municipality, as compensation for the use

of its franchise privileges. Third, the highest and lowest quotations of the shares of stock of said company during the twelve months preceding the date of assessment, and the number of shares of stock sold at such quotations. Fourth, any other fact or condition or circumstance that will assist in arriving at a just, fair cash value of said capital stock."

The court held that the rules adopted were improper because they entirely eliminated from consideration the indebtedness of the corporations and that the element of indebtedness must be taken into consideration in order to ascertain the cash value of the capital stock, including the franchise; that the amount paid to any municipality as compensation for the use of its franchise privileges should not be taken into consideration because such outlay is but a current expense and ought not to be considered in determining the question of value any more than the items of interest or labor.

But the importance of the decision lies in the fact that the court decides that it can control to such extent the action of assessors by mandamus proceedings.

And it may be fairly assumed that if the action of assessors can be thus the subject of control by mandamus to coerce them to assess the capital stock and franchises of a corporation, on principle, the aid of the courts could be invoked to compel an assessor to properly value and assess the property of an individual.

The rule laid down by the court for properly assessing the true value of the capital stock and franchise of a corporation is upheld by the Supreme Court of the United States in the tax cases 92 U. S., 575.

The Illinois court in the opinion refer to the fact that the aggregate value of the capital stock and indebtedness of one of the thirteen companies over and above its tangible property was about \$50,000,000.00; and it should have gone on the assessment rolls at about \$10,000,000.00, while the state board

had assessed it at \$450,000—something like nine millions less than it should have been assessed.

An item in a Chicago newspaper soon after the decision stated that the members of the board of assessment and review had been very much astonished by the appearance before it of the attorney of one of the thirteen companies who requested the board to place the aggregate value of the company represented by him at \$39,000,000.00 and this would be satisfactory to his client and would prevent any further appeal and litigation. Catherine Goggin must have gone to her schoolroom after reading this item in her morning paper feeling that the labors of her committee of teachers had certainly borne ample fruit.

So much has been said in a general way about the franchise tax law of New York that a reference to its provisions may not be inappropriate here.

The law was passed in 1896. Under its provisions every domestic corporation pays an "organization tax" of one-eighth of one per cent on its capital stock. Foreign corporations pay a "license tax" of one-eighth of one per cent for the privilege of exercising their franchise.

In addition, every corporation organized under New York laws must annually pay a tax, to be computed upon the amount of its capital stock used within the state, of one-fourth of a mill *per centum* of the dividends made and declared upon its capital stock every year, if the dividend amount to or exceed 6 per cent upon the par value of the stock; if less, then at the rate of one-half mill *per centum* upon such portion of the capital stock at par, as the amount of capital stock employed within the state bears to the entire capital stock. If no dividends are declared the tax is one and one-half mills upon each dollar of appraised capital employed within the state.

Then there is an additional franchise tax upon "transportation" and "transmission" companies, including steam surface

railways, canal, steamboat, ferry, express, navigation, pipe line, transfer, baggage express, telegraph, telephone, palace or sleeping car companies, which must each pay for the privilege of exercising its corporation franchise, or carrying on its business in such organized capacity an *annual excise tax* or *license* fee equal to five-tenths of one *per centum* upon its gross earnings within the state, on business originating and terminating within the state.

Elevated or surface roads not operated by steam, one per cent upon gross earnings from all sources within the state, and three per cent upon the amount of dividend in excess of four per cent upon the actual paid up capital stock.

There is also a franchise tax on companies operating water-works, gas, electric lighting and heating, at the rate of five-tenths of one *per centum* annually upon the gross earnings and three *per centum* on amount of dividend in excess of four per cent.

Insurance companies must pay an annual tax of five-tenths of one per cent on the gross amount of premiums received; and foreign bankers one-half of one *per centum* on business done in the state.

It would seem that the New York tax is largely in the nature of license or privilege taxes, and in addition to such a tax the franchise of the company, even in that state, might be assessed as personal property, in the same manner authorized by the decision in the Illinois case.

In the case of Commonwealth of Kentucky vs. Henderson Bridge Company, 166 U. S., 150, it is held that a state tax on the intangible property of a company chartered by the state and maintaining a bridge over a river on the state boundary is not an unconstitutional burden on interstate commerce, and that the right of the state to levy such tax is not defeated by the fact that the company had obtained from another state the privilege of extending its bridge from the boundary of the

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state, and had acquired from congress the privilege of maintaining the bridge across a navigable stream.

In the case of *Adams Express Company vs. Ohio State Auditor*, 166 U. S., 185, Mr. Justice Brewer delivered the opinion and in discussing this question says:

"In the complex civilization of today a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a state from taxing at its real value such intangible property. Take the simplest illustration: B, a solvent man, purchases from A certain property, and gives to A his promise to pay, say, \$100,000 therefor. Such promise may or may not be evidenced by a note or other written instrument. The property conveyed to B may or may not be of the value of \$100,000. If there be nothing in the way of fraud or misrepresentation to invalidate that transaction, there exists a legal promise on the part of B to pay to A \$100,000. That promise is a part of A's property. It is something of value, something on which he will receive cash, and which he can sell in the markets of the community for cash. It is as certainly property, and property of value, as if it were a building or a steamboat, and is as justly subject to taxation. It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country."

"The first question to be considered therefore is whether there is belonging to these express companies intangible property; property differing from the tangible property; a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man. Take the *Henderson Bridge Company's* property, the validity of the taxation of which is before us in another case.

The facts disclosed in that record show that the bridge company owns a bridge over the Ohio, between the city of Henderson in Kentucky and the Indiana shore, and also ten miles of railroad in Indiana; that the tangible property—that is, the bridge and railroad track—was assessed in the states of Indiana and Kentucky at \$1,277,695.54, such, therefore, being the adjudged value of the tangible property. Thus the physical property could presumably be reproduced by an expenditure of that sum, and if placed elsewhere on the Ohio river, and without its connections or the business passing over it or the franchises connected with it, might not of itself be worth any more. As mere bridge and tracks, that was its value. If the state's power of taxation is limited to the tangible property, the company should only be taxed in the two states for that sum, but it also appears that it as a corporation, had issued bonds to the amount of \$2,000,000, upon which it was paying interest; that it had a capital of \$1,000,000, and that the shares of that stock were worth not less than \$90 per share in the market. The owners, therefore, of that stock had property which for purposes of income and purposes of sale, was worth \$2,900,000. What gives this excess of value? Obviously the franchises, the privileges the company possesses—its intangible property."

"Now, it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation. Suppose an express company is incorporated to transact business within the limits of a state and does business only within such limits, and for the purpose of transacting that business purchases and holds a few thousands of dollars worth of horses and wagons, and yet it so meets the wants of the people dwelling in that state, so uses the tangible property which it possesses, so transacts business therein, that its stock becomes in the markets of the state of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property,

not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation."

I regret that when selecting a subject for this address, it did not occur to me that the question of assessment and taxation was to be treated by Senator Smith in his paper to be read at this meeting. As the Senator is a member of the Commission appointed by the legislature to prepare a bill for proposed adoption covering the entire subject of assessment and taxation, his opinions are justly entitled to great weight.

In examining the proposed act for the purpose of ascertaining the provisions therein with reference to the taxation of franchises I find that the provision is somewhat indefinite. Section 63 provides that the assessor shall assess to the corporation "the value of its franchises, in addition to the usual valuation of its tangible and intangible property." But as the franchise is intangible property, the language of this section is open to criticism. Moreover, I think the law should provide, like the Illinois law, that the state tax commission shall formulate rules for the valuation of franchises and capital stock of corporations; or better still, the act itself ought to provide that the rule laid down by the United States Supreme Court, referred to and adopted by the Illinois court, shall be the rule for the valuation of the capital stock and franchises of a corporation.

It is not perhaps germane to the subject, but after a careful examination of the act prepared by the commission, there are a few suggestions somewhat in the nature of criticisms, which I venture to offer, and to which Senator Smith may, perhaps, see fit, in his paper tomorrow to reply.

To begin with, I find many things in the new law to commend. It appears, however, to be cumbersome and to go at too much length into details. Aside from the gross inequalities of the assessment of property occasioned by the arbitrary action of assessors in the various counties, the principal objec-



tion to the law as it stands arises from the difficulty experienced everywhere in securing anything like an adequate valuation and return of personal property. Farm lands, town lots and railroad property have always paid more than their just proportion of the burdens.

It is the almost complete failure to get personal and especially the intangibles upon the tax rolls, which has caused the inequalities and the lack of revenue.

One of the objections to the bill is the re-enactment of the law of 1899 providing in substance that if any person "shall sell all his personal property after it has been assessed and before the tax is paid thereon and shall not retain sufficient to pay said tax, the tax for that year shall be a lien upon such property and shall at once become due and payable, and the County Treasurer shall at once issue a tax warrant for the collection thereof." The act provides that property sold in the ordinary course of retail trade shall not be liable in the hands of the purchaser, but the enforcement of this provision will necessarily operate as a restraint upon trade, and the trouble and costs of the enforcement, in my opinion, will be out of all proportion to the amount of taxes collected. I may be mistaken. The next objection is to the provision that if the property of any tax payer be so seized by legal process as not to leave a sufficient amount exempt from levy and sale to pay the taxes thereon, the tax for that year shall at once fall due and be paid from the proceeds of the sale, and providing further that all sheriffs and constables and city aldermen are to at once inform the county attorney of the making or attempted making of any sale or levy of attachment and removals of personal property, and it is made the duty of the county attorney forthwith to proceed to recover the tax.

Provisions of this character serve rather to encumber the statute books; or if attempted to be enforced, the game would not pay for the candle. If all the personal property taken

under writs of attachment in the state in any one year was sold at public auction, the entire sum realized would hardly warrant such a law—to say nothing of a pitiful four or five per cent by way of a tax. It is not the escape of the little leaks which is causing the trouble.

In the preface to the report published by the commission it is explained that by a simple provision the deputy assessors are all to be confirmed by the board of county commissioners, which we are informed “broadens the responsibility of the deputy assessors and prevents the county assessor’s office being made a machine for patronage”. Under the present law the deputy assessors in the cities of the first and second class are confirmed by the board of county commissioners, and if there are any cities of the first or second class where their appointments have not heretofore been the result of political favors and patronage it is something new.

Another objection to the proposed law is in the provision for the appointment of the tax commission by the Executive Council instead of by the governor. The power of appointing the provisional members to serve until the next election should, in my opinion, be lodged in the governor, instead of in the Executive Council. The latter plan simply belittles the office of governor, and takes from the responsible head of the executive department of the state a power which that office should exercise, if it is exercised at all.

Lastly, I would ask the authors of the proposed law what, if any reason, can be given why the power of assessing the property of telegraph, telephone, express and pipe lines is given to the tax commission, and the power of assessing the property of railroad and car companies is left with a board to be known as the board of railroad assessors? And why the provision is made that the board of railroad assessors is to be composed of the lieutenant governor, secretary of state, state treasurer,

auditor of state, attorney general, and the two tax commissioners?

If there is any reason why a lieutenant governor is any more qualified to assess the property of a railroad company than he would be to assess the property of an express company, or if he has, *ex-officio*, any particular qualifications for doing either, I wish the authors would enumerate.

The railroads of this state have not in the past escaped taxation. Their property is easily found and its value easily determined; and that railroad property has paid in Kansas more than its just proportion of the burdens of taxation, is apparent to any careful observer; but if there is need of a tax commission to supervise and equalize the assessment and valuation of property generally for the purpose of taxation, let us make the commission a strong one, by providing more members, and by providing for decent salaries, and then give it authority to act as a state board of equalization and to tax the property of railroads as well as that of telephone, express, and telegraph companies, and take, to that extent, the question of the assessment of railway property out of politics.

## PARDONS AND PAROLES.

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GOVERNOR W. E. STANLEY.

At all times correction and punishment have been deemed necessary in well organized government. There can be no government without law. Law is useless without its reasonable enforcement, and the enforcement of law would be impossible without some punishment for its violation. Society has felt the need of prisons, reformatories and houses of correction quite as imperatively as it has felt the need of churches and schools. Not to the same extent, perhaps, but in some degree it has deemed them just as essential.

Our public schools recognize this fact and have provided a system of merits and demerits, reaching from substantial class honors on the one hand to suspension and even expulsion on the other, to encourage and stimulate observation of school discipline and discourage its infraction. Even the home recognizes this principle, and there are very few well regulated homes, where, in the raising of children, some form of punishment is not administered for disregard of parental authority. This runs all the way from infliction of corporal punishment to withholding some privilege or favor, but in all forms of administration we find a recognition of the principle of reward for right doing and punishment for wrong doing.

Many reasons are assigned for the infliction of punishment by the state, the chief among which are punishment for the

wrong committed and the correction and reformation of the wrong doer.

Punishment ought to follow the violation of the law, as a matter of course, and, except in very aggravated cases, the certainty of punishment rather than the extent of it, is the thing to be desired. The punishment ought in some measure to be commensurate with the offense committed, and in this, we find some of the difficulty attendant upon the enforcement of the criminal statutes.

If the punishment ought to be commensurate with the offense committed, then some way should be devised by which the punishment in one community would be about the same as that in another community for the same offense committed under like circumstances; but this is not the case, and it seems difficult to suggest or devise a plan by which this may be done. Take, for instance, one of the most common of offenses, that of larceny. The punishment for grand larceny, under our statute, is confinement and hard labor for a term not exceeding five years. A person is convicted in one district for stealing a watch of the value of \$25, and is sentenced by the presiding judge to confinement at hard labor for a term of five years—the limit of the statute. In another district, a person is convicted of stealing a watch of the same value, under exactly similar circumstances, and the presiding judge in that district sentences him for a period of one year,—the minimum sentence provided by the statute. If punishment should be adequate to the offense committed, it would seem that in the cases I have cited, there is something wrong, which, as I have already said, I see no means of correcting, and the first case would probably be a proper one for executive interference.

Another illustration: Two persons are charged with burglary and larceny, in entering a dwelling in the night time and taking goods under circumstances which would constitute burglary in the first degree. The evidence at the trial dis-

closes that one of the parties is a hardened criminal and has been guilty of many violations of the statute; that the other is a young man of previous good character, that the offense with which he is charged is his first, and that he had never shown criminal tendencies or a vicious disposition. The respective judges sentencing these two men gave each the same sentence. The wrong in one of these cases is clearly manifest. The fault is not in the law but in its administration.

Again, two parties are sentenced for the commission of like offenses and committed to the penitentiary. From the time of their admission, one conforms to the rules, yields readily to prison discipline, performs the tasks assigned him cheerfully and wins the confidence of the prison officials. His whole demeanor in prison and his life before conviction warrants the conclusion that if he should be released after a short term of imprisonment, under certain conditions, he would make a good citizen. The other, from the day of his admission to the penitentiary shows an entire disregard of prison rules, is restless, and troublesome under the restraint of discipline, creates suspicion in the minds of the prison officials and leaves the impression that if he should be released, he would not be a law-abiding citizen.

Illustrations might be multiplied to show that every case must be treated wholly upon its own merits, and that there are many persons imprisoned in the penitentiary, whose former lives, whose conduct in the prison and the consideration of the circumstances surrounding the commission of the offense, would justify the belief that they would return to the ranks of good citizenship. These are the cases which appeal most strongly for executive clemency, and run all the way from the persons who observe the prison rules in the fullest degree and win the fullest confidence of the prison officials, to those who barely observe the rules and leave a doubt as to the wisdom of their release.

In the absence of a showing of fraud or partiality, all presumption must go in favor of the fairness and regularity of the trials under which convictions were had, and this being the case, pardons ought to be the exception, and granted only in extreme cases. The parole system, however, I think would help to solve many of the difficulties that attend the matter of absolute pardon. The conditions upon which paroles are granted in this state are: That the prisoner on parole shall abstain from the use of intoxicating liquors; that he shall not frequent places where intoxicating liquors are sold or drank; that he shall not engage in any form of gambling, or frequent places or company where, or by whom gambling is done; that he shall abstain from criminal, vicious, lewd or unworthy associates; that he shall, on the first day of each month, make a report, in writing to the warden of the penitentiary, giving a statement of his occupation, location and condition, the name of his employer and such other facts as the warden may require. And the right is reserved to the executive to re-commit to the penitentiary in case of the violation of any of these conditions.

The release of a prisoner under these conditions makes the state, in a measure, the guardian of his conduct. It puts him absolutely upon his good behavior, with the knowledge that if he violates any of the conditions upon which he was released, he will be returned to the prison for the remainder of his term of sentence, and this, in most cases, will insure his good conduct until the term of his original sentence has expired, or by act of the Governor he is pardoned and restored to citizenship.

Another requirement in this state, and one, I think, that should prevail everywhere, is, that some responsible person shall guarantee to give the paroled prisoner honorable employment where he will be removed from vicious or immoral influences. This enables him, as soon as he is

released, to secure honorable employment, and the knowledge that he is under the watchful care of the state, and the fact that he has been furnished with employment, so that he will not be under even the apparent necessity of committing crime, in nine cases out of ten, (and in many cases in a much larger proportion, as has been the case here) will be so helpful that when the term has expired the prisoner paroled will have no disposition to further violate the criminal statutes.

It is exceedingly gratifying for me to be able to state to this Association, that of the ninety prisoners released on conditional pardon and parole since the beginning of my first term, only three have violated its conditions. The others are engaged in honorable employment, earning an honest livelihood and show a disposition to evidence appreciation of their release by pursuing an honest and industrious life.

I take great pleasure in saying that after nearly three years of trial, I am thoroughly convinced that the parole law, if wisely administered, can be of large service in reforming those committed to the penitentiary, and will work a great good to the community.



## ANNUAL ADDRESS.

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JAMES HAGERMAN.

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## LAWYERS AND BAR ASSOCIATIONS.

*Mr. President and Gentlemen of the Bar Association of the State of Kansas:*

To speak of *Lawyers* to *Lawyers* and of *Bar Associations* to a *Bar Association*, is much like "carrying coals to New Castle." The kind invitation emanating from your Executive Council for me to deliver the annual address of your association accorded me the privilege of selecting my own subject. It would doubtless have been more interesting to you, and, perhaps more profitable to myself, had you chosen for me some theme apart from your and my daily work, so as to have taken for this brief hour our thoughts away from ourselves and into a more contemplative, ethereal and imaginary region than that which we shall traverse tonight. I would then have spoken under a sort of compulsion, and compelled work is frequently the best.

Lawyers, who and what are they? When Jack Cade, centuries ago, started his revolution in England, his pronouncement was, "First, let's kill all the lawyers." His semi-barbaric mind saw them in their collective capacity and knew they stood in the way of his well-intended but visionary purposes.

All enemies of governments, institutions, social order, life protected, liberty regulated and property guarded by law and

all tyrants and advocates of unlimited and irresponsible power, all wrong-doers and wrong-intenders, know that the lawyers, like a solid phalanx, stand in their way, and are to be reckoned with. To these arch enemies of mankind the lawyers have "a local habitation and name," and are as visible as the Army or Navy or Church. Lawyers *only* seem to be unconscious of their embodied individuality and collective power and the large part which in the aggregate they play in the affairs of the civilized world. They alone seem unable to define themselves.

The American lawyers include attorneys, solicitors, proctors, counsellors, advocates and, I should say, judges, save that I am reminded of what I heard one of our great leaders say in a speech delivered at the banquet in New York on the occasion of the celebration of the centennial of the organization of the Supreme Court of the United States when, in responding to the toast of "The Legal Profession," he began his address, "My fellow-lawyers, for we are all lawyers here," and then, glancing at the Supreme Justices who were all ranged in a row, but not in their funereal gowns, added, "except the *judges*."

The judges, at least, are lawyers before going on and after coming off, whatever their "antic dispositions" while on the bench.

During the throes of the Civil War, south of Mason and Dixon's line called "the war between the States" and north "the war of the Rebellion," when our country was sorely pressed for revenues for the support of its armies and navies on land and sea, Congress passed a most stringent law taxing everything conceivable and many things inconceivable and gave the most searching definition of lawyers which I have ever seen put in concrete form:

"Every person who *for fee or reward* shall prosecute or defend causes in courts of record or other judicial

tribunals of the United States or of any of the States (or Territories), or whose business it is to give legal advice in relation to any cause or matter whatever, shall be deemed to be a lawyer."

Take this definition of the tax-gatherer and qualify it by adding "admitted to the bar and acting under official oath," and we have nearly the body of men who I understand to be "The Lawyers." It will be noted this does not cover the Bench; it includes, however, all the Bar. I would include under "The Lawyers" of whom I speak the professors and teachers of law schools and colleges and the writers and authors upon jurisprudence who are members of the bar.

By "Lawyers" I do not mean those who represent themselves, but those acting in a representative capacity, which implies an agency—a principal and an agent, or, what is nearer—a trustee and a beneficiary, or, still nearer—an office, an official and a constituency.

The lawyers in the United States at the present time are roundly estimated at above 90,000 in number. They have no insignia of office, are of the plain citizens in every community, —their reputation largely local, and when they pass away their fame is, except in rare instances, only traditional. The formal evidence of their right to practice their profession is scattered through the records of many thousands of courts and occasionally preserved in the form of a license which, if not lost or destroyed, most frequently finds a resting-place in cellars or garrets or among the musty tomes of their offices.

The written evidence of their work is found in the records of the courts, their briefs written and printed, the skeleton summaries of them in the reported decisions, their professional correspondence with each other and their clients, their written opinions in the archives of business correspondence everywhere, and now and then their oral speeches and arguments reported in the current newspapers, but generally either

unnoted or preserved uncopied and untranslanted in stencographers' notes.

What shall I say of the unrecorded work of the American lawyers when facing, as adversaries, each other in the courts, with a client and a cause before the deciding tribunals? If preserved, the record would, in volumes, exceed more than a thousandfold the Congressional records! And the work would be shown to be of equal merit and to represent greater labor, and of no less importance to the people and the Nation, the States and the Territories.

What of the numberless interviews, consultations and struggles between lawyers of opposing clients seeking to avoid controversies, reconcile differences, adjust disputes before suits and to settle suits without trial?

What of the toilsome labors of the day and the wearisome vigils of the night spent in their client's interest and for their client's cause?

The lawyers of our country, taking them as a body, are the centripetal force which holds together society and our governments, state and national. Without them the judicial branches of our governments would be paralyzed, could not perform their functions and would cease to be! With the destruction or suspension of the judiciary our form of government would be radically changed, indeed completely overthrown! Under our system the lawyers are an indestructible part of the judiciary and the advisers and directors of the executive and legislative branches of the government. In all the affairs of life they are the advisers, friends, representatives and champions from the cradle to the grave of the generations which come and go.

I am mainly considering *The Lawyers* in the aggregate, yet I have thought and written much and spoken often of the individual lawyer and his vocation, for always there must be

"the man behind the gun"; and I trust I will be pardoned if in this part of my address I plagiarize from myself.

Of the lawyer it has been well said:

"He stands at the point where the antagonisms of society meet, where vice is most active and virtue most conspicuous, where countless thousands come, some to have justice awarded them, some to inflict the opposite, and others—an unwilling group—to expiate offenses."

There can be no civilization without law and law cannot be applied or enforced without lawyers. You can as well conceive of love without lovers, or of a family without father, mother, children or kindred, or of a man without a soul, as of law without lawyers.

Chancellor Kent, in his commentaries, says:

"The necessity of a distinct profession to render the application of the law easy and certain to every individual case has always been felt in every country under the government of written law. As property becomes secure and the arts are cultivated and commerce flourishes, and when wealth and luxury are introduced, and create the infinite distinctions and refinements of civilized life, the law will gradually and necessarily assume the character of a complicated science requiring the skill and learning of a particular profession."

As long as civilization lasts the demand for lawyers will ever grow. He existed not in professional name but in substance in the most primitive times. When the parent was first called to determine the merits of a quarrel between his children, which should be punished and what penalty should be inflicted, he assumed the office of a judge, and the children in setting forth their conflicting stories, and specially in urging their reasons and extenuations, were advocates in a modified form.

And the questions put by the father to elicit the truth was really probing them by the test of cross-examination.

When we consider that every constitution, statute and treaty is written by the lawyer and all these and every contract known to man may be passed upon by the lawyer when made, and when construed and enforced, and every offense for which he is called to judgment or sought to be punished, is the subject of the lawyer's consideration, we begin to get some conception of his functions, power and importance. From the ranks of the lawyers come the judges, and the power to pass final judgment on the rights of men and things is of the highest nature, second only to that of the Creator of the universe when He shall come to judge the quick and the dead in the morning of the resurrection. The whole range of human knowledge as applicable to the practical affairs of life at one time or another passes under the lawyer's review. While he cannot have anything like a universal technical education, he should be so trained as to call upon others to furnish the particular knowledge, and should have the capacity to determine how to utilize it to accomplish the purposes of justice.

The beginner at the law should understand the nature of his vocation, its relation to society and government and the affairs of life. He should set before himself high ideals. When he enters the practice he becomes in the first instance the adviser of those who seek his services touching their rights, duties and liabilities, what course they shall pursue or avoid, and later their spokesman and champion. His position is always one of trust. Between him and his client there should be absolute confidence and truthfulness. He should always remember his duties to himself, to the State, to his clients, to his adversaries and to the court of which he is a component part, for the constituent elements of the court are the judge, the jury and the bar. A court is a place where justice is judicially determined, a tribunal appointed by the

State for determining those controversies which cannot be amicably adjusted. Under our system of government a court cannot pronounce judgment until opposing parties are notified and heard or given an opportunity to be heard. It proceeds after notice and gives judgment after a hearing. The highest work of the lawyer is in the court room. Some deny this, but I earnestly assert it. In this day and generation it is claimed more money may be made by lawyers outside than inside the court room. It ought not to be so. What would be the history of the bench and bar without the great contests which have taken place in the courts and the great arguments made there? What would our judges be and what would the law be without them? Blot from the traditions and literature of the law the splendid arguments of Mansfield, Erskine, Webster, Pinckney, Rufus Choate, O'Connor, Carpenter, Curtis, Glover, Hall and Broadhead and a host of others, living and dead, too numerous to name, and the loss to jurisprudence would be irretrievable.

The work in the court room is not the only work of the lawyer, but I contend it is the highest order of work and requires the highest order of ability. It has become almost absolutely essential to the lawyer managing cases in the courts to be able to wield his pen even more potently than his voice. Specially is this so in appellate courts and in equitable causes. While nothing can supply the place of a good brief and a strongly written argument, yet these are not inconsistent with oral arguments and cannot supply them. Indeed they should go hand in hand. I would feel immeasurably gratified if as a result of anything I may say to-night, I could inspire one or more of the younger lawyers who may have an aptitude in that direction to resolve to fit themselves for the preparation and trial of cases in the courts and not under any temptations permit themselves to be withdrawn from court work. It does not require oratorical ability as ordinarily

understood to make a good trial lawyer. It is sufficient that careful preparation be made and that true views of the case be had and enforced by cogent reasoning which will inspire the confidence and convince the judgment of the court and jury. The lawyer must know the case in hand, have its personality impressed upon him and thus be able to make those to whom he appeals see it in its true light. The trial lawyer is to be congratulated, not commiserated, that much of his work may be before the jury. Let me quote from an address of our present Minister to England, Mr. Choate, and one of the leaders of the American Bar, delivered less than four years ago before the American Bar Association at Saratoga, and wherein he spoke in advocacy of the jury and its continuing perpetuity and constitutional inviolability, and where he said that a jury trial is "that picturesque, dramatic and very human transaction, that arena on which has been fought the great battles of liberty against tyranny, of right against wrong, of suitor against suitor, that school which has always been open for the instruction and entertainment of the common people of England and America, that nursery, that common school of lawyers and judges, which has had five times more pupils than all the law schools and Inns of Court combined—for there are ninety thousand lawyers in America, of whom four-fifths probably never saw the inside of a law school."

And in the same address he further said:

"This trial by jury for which I stand, is not only  
"ancient as magistracy, rich in the traditions of free-  
"dom and of justice, glorified by the prestige and the  
"prowess of all the great advocates of our race, but it  
"is the proudest and most delightful privilege of our  
"whole professional life. It alone atones for and  
"mitigates all the drudgery and painful labor of the  
"rest of our professional work. Here alone we feel  
"the real joy of the contest, that *gaudium certaminis*,



"which is the true inspiration of advocacy. Here  
"alone occur those sudden and unexpected conflicts:  
"of reason, of wit, of nerve, with our adversaries, with  
"the judge, with the witnesses; those constant sur-  
"prises, equal to the most startling in comedy or  
"tragedy. Here alone is our one entertainment,  
"in the confinement for life to hard labor, to  
"which our choice of profession has sentenced us, and  
"here alone do the people enter into our labors and  
"lend their countenance to our struggles and triumphs.  
"Sorry indeed for our profession will be the day when  
"this best and brightest and most delightful function,  
"which calls into play the highest qualities of heart,  
"of intellect, of will and of courage, shall cease to  
"excite and to feed our ambition, our sympathy and  
"our loyalty."

The lawyer should be courageous and bold. He should belong to no man but wear his own hat and own his own conscience. When deliberately inlisted in his client's cause he should if necessary stand for his client's rights against the combinations of the strong, the wealthy and the powerful, the tyranny of administrations, the oppressive or unconstitutional measures of legislatures and of Congress, the fury of the mob, the clamor of the press or the outcry of the populace. Neither the frowns of power nor the railings of demagogues nor the specious flatteries of the timid and time-serving nor the alluring bribes of place or patronage or riches should swerve him from his duty. The weaker, poorer and more deserted the client and the stronger the adverse currents of passion and prejudice against him the greater the necessity for the activity and courage of the lawyer.

The most highly colored picture of the devotion which an advocate is supposed to owe to his client is that drawn by Lord Brougham in the well-known and striking passage that

occurs in his defense of Queen Caroline before the House of Lords:

"I once before took occasion to remind your lordships, which was unnecessary, but there are many whom it may be needful to remind, that an advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world, that client and none other. To save that client by all expedient means, to protect that client at all hazards and costs, to all others, and among others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client's protection."

It will be interesting to quote, with reference to this passage, an extract from a letter which Forsythe, author of *History of Lawyers* received from Lord Brougham in 1859. He said:

"I wish to mention to you, in reference to what you discuss in chapter 10, on the duties and rights of an advocate, and where you refer to what has been so often the subject of dispute, my statement in the Queen's case. The real truth is, that the statement was anything rather than a deliberate and well-considered opinion. It was a menace, and it was addressed chiefly to George IV, but also to wiser men, such as Castlereagh and Wellington. I was prepared, *in case of necessity*, that is, in case the Bill passed the Lords, to do two things: First, to resist it in the Commons *with the country at my back*; but

next if need be to dispute the King's title to show he had forfeited the crown by marrying a Catholic, in the words of the act 'as if he were naturally dead.' What I said was fully understood by George IV; perhaps by the Duke and Castlereagh, and I am confident it would have prevented them from pressing the bill beyond a certain point."

Attorney is synonymous with agent, and advocate in its original signification means friend. The principal has no right to ask an agent to do anything fraudulent or unlawful, and a friend can truly serve a friend only when he serves him honorably. There is no room for the assumption that a lawyer can do for a client what he could not rightfully or lawfully do for himself. It is a fundamental, personal and inalienable right of a citizen to consult a lawyer of his own selection as to his legal rights touching transactions in the present and future and as to his legal responsibility for things done in the past, and the seal of confidence and privileged communication shields the consultation, and the true lawyer will guard it as if it were the confessional. Under the cloak of privileged communication the lawyer cannot advise for the client a course which it would be fraudulent or illegal for him to adopt were the case his own, nor can he rightfully advise the client to a course which, if known, could not be justified before the judges and the bar under the ethics of the profession, as known and practiced by its highest and noblest members. I have often thought that every professor in a law college should be required during the last year of the senior class to deliver and have published one lecture on the ethics of our profession. It should be mandatory that he express his own matured views, and where he has been a practicing lawyer, state the rules which have governed him. Every judge at least once during his term of office should deliver a kindred address, reduced to writing. Such a series of lectures and

addresses though tautological would arouse wide interest, provoke much discussion, show differing opinions, do great good and lead to an ultimate code of professional ethics of high value and commanding influence.

The inscription on the coat of arms of my own state, "Let the safety of the people be the supreme law," should be the guide of the lawyer, and that can best be secured by pure and impartial courts aided in their wholesome work of the administration of justice by a fearless and independent bar.

The lawyer should ever stand for the supremacy of the law. By the nature of his vocation he is more or less a conservative, yet he should never be such a fossil as to block the way of real progress. If existing laws are unjust in their operations, or new laws are needed to deal with existing mischiefs, our constitutional form of government provides the way which can be readily pointed out by the lawyer for the repeal of unjust and the passage of just laws. In the presence of arms the voice of the lawyer may be silenced but his counsel and influence even then is felt. In peace he is a participant in every form of contesting rights. In war he is still the adviser and counselor of governments and of men. There are laws of war as of peace to be passed upon by him.

The American lawyer deals with the laws of nations, constitutional law, statutory law, civil and criminal law, admiralty, bankruptcy, patent, probate, common law, equity and the law of natural justice, and as was once beautifully said should "ever bear in mind the precepts of the divine law on which all others are based." His practice ranges from international courts of arbitration to an arbitration between neighbor and neighbor, from the Supreme Court of the United States and the various appellate and trial courts, national, state and territorial, to the commissioners of the district and justices of the peace of the ward or township and the police courts of the city. He is often called upon to represent his client before legislatures

and their committees, public officials and commissions and various other tribunals. It depends upon himself to make his service in all these cases and in all these places an honorable service. One fundamental condition of honorable legal service is that it should not be secret, but known to all entitled to know. I mean the lawyer is in danger when he has a client whom he will not openly own, or engages in professional work which he keeps secret. Every court, person or body before whom a lawyer appears has the right to know for whom he appears. The lawyer should take pride in his profession and labor to uphold and advance it as a predominating power in the state. He should stand for the elevation of his local bar, the bar of his state and of the country. It is not inconsistent but in harmony with his profession to take an active interest in political affairs, but he should not allow himself to abandon the duties of his profession to chase the *ignis fatuus* of office. From the ranks of the lawyers are drawn the judges, attorney generals and prosecuting attorneys, and nearly always the majority of the legislators whether Congressional or State, and generally the higher executive officers, such as Presidents, Cabinets and Governors. The lawyer should be equipped to respond to calls in this direction, but should not wear out his life and happiness and destroy his professional usefulness by untimely seeking them.

If at times he wanders from the activities of his profession he should be prepared to return to them so long as he has health and strength. Benjamin Harrison never stood higher than, after ceasing to be President, he returned to his law office, re-entered the ranks of the profession and became once more a plain lawyer,—great in his strength and simplicity, claiming nothing because of the high office he once held but standing alone on his merits as a lawyer.

Whether good or adverse fortune o'ertake the lawyer in fol-

Following his chosen profession, he should ever bear in mind the noble, eloquent and inspiring words of Edmund Burke:

"There is one thing and one thing only, which  
"defies all mutations — that which existed before  
"the world, and will survive the fabric of the world  
"itself: I mean justice, that justice which emanating  
"from the divinity has a place in the breast of every  
"one of us given us for our guide with regard to our-  
"selves and with regard to others, and which will  
"stand, after this globe is burned to ashes, our advo-  
"cate or our accuser before the great Judge when He  
"comes to call upon us for the tenor of a well-spent  
"life."

Gentlemen: Is it not a beneficent sign of the times that there is a continuing and ever-increasing interest among lawyers in bar associations? Are not these associations developing along the lines of rightful evolution, bringing the lawyers in touch with each other, establishing fraternal relations between them, making a needed record of their work, thoughts, hopes, aspirations and ambitions, and for no selfish ends, but with noblest motives advancing the science of jurisprudence, promoting the ends of justice, upholding and dignifying the profession, aiding the Bench in the administration of justice, contributing to the perpetuity of our republican institutions and leading to ultimate "peace on earth and good will toward men."

Bar associations, as they now exist in our country, are of recent growth. Before them the only form of organization among lawyers was here and there library associations and clubs having for their objects community of access to and ownership of law libraries.

Today there are, not counting libraries and clubs, about three hundred and forty-six bar associations in the United States, with a membership in the aggregate of not less than

seven thousand; and state bar associations in every state of the Union, except Massachusetts, Florida, Wyoming and Nevada, and territorial bar associations in every territory including Alaska, the District of Columbia and the Indian Territory, exclusive, however, of the Philippines, Porto Rico, Hawaii and other islands of the seas.

In addition to the forty-one state, five territorial and the District of Columbia, forty-seven in all, there are not less than two hundred and ninety-eight county and city bar associations in the United States.

Massachusetts (where, owing, I assume, to the dominancy of the city of Boston, there is no state association) has sixteen, and Florida (also without a state association) three flourishing county and city bar associations. Wyoming and Nevada alone of our sisterhood of states have none.

The following are the reported number of bar associations in the United States other than National, Territorial and State, and not including library associations, as shown by the last annual report of the American Bar Association:

Alabama.....	1	New Jersey.....	11
Arizona.....	0	New Mexico.....	0
Arkansas.....	1	New York.....	11
California.....	5	North Carolina.....	0
Colorado.....	3	North Dakota.....	1
Connecticut.....	2	Ohio.....	27
Delaware.....	3	Oregon.....	2
Dist. Columbia.....	2	Pennsylvania.....	62
Florida.....	4	Rhode Island.....	1
Georgia.....	3	South Carolina.....	0
Illinois.....	7	South Dakota.....	7
Indiana.....	22	Tennessee.....	4
Iowa.....	34	Texas.....	2
Kansas.....	0	Utah.....	0
Kentucky.....	0	Vermont.....	●

Louisiana.....	0	Virginia....	1
Maine.....	7	Washington..	8
Maryland.....	5	West Virginia.....	5
Massachusetts.....	16	Wisconsin .....	7
Michigan.....	10		
Minnesota.....	8		298
Mississippi.....	4	Add States.....	41
Missouri.....	2	Territories.....	5
Montana.....	3	Dist. of Columbia	1
Nebraska.....	3		
New Hampshire.....	4	Grand total.....	345

Of all the existing state and territorial bar associations that only of New Hampshire was organized prior to the organization of the Bar Association of the City of St. Louis, of which I have the honor to be an active member, and of the existing county and city associations only New York, and perhaps one or two others, antedate that of the city of St. Louis. The state association of New Hampshire was organized in 1873; the city association of St. Louis in April, 1874; the state association of Kansas in 1883, and of Missouri in 1880.

The American Bar Association was organized August 21, 1878, and held its twenty-fourth annual meeting last summer in Denver. Of the state and territorial associations only New Hampshire, District of Columbia, Connecticut and New York were organized prior to 1878.

The constitution of the Bar Association of the City of St. Louis, one of the pioneer associations adopted, as we have seen, in 1874, declares:

"This association is established to maintain the honor and *dignity* of the profession of the law, and to cultivate social intercourse among its members and for the promotion of legal science and the administration of justice."



The constitution of the American Bar Association, adopted in 1878, says:

"Its object shall be to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the United States; uphold the honor of the profession of the law, and encourage cordial intercourse among members of the American Bar."

You will have observed the striking similarity in these two constitutions. As the late James O. Broadhead, one of the leaders of the St. Louis Bar, and a member of that city's association, was the first President of the American Bar Association, it was but natural that the national association should, in framing its constitution, follow closely as a precedent that of the Bar Association of its President's home city.

The constitution of the Missouri Association, adopted in 1880, provides:

"Its object shall be to advance the science of jurisprudence, promote the administration of justice, uphold the honor of the profession of the law and encourage cordial intercourse among members of the Missouri Bar."

The same as the American Bar Association save as to the field of its work.

The constitution of the Bar Association of Kansas declares:

"The object of the association shall be the elevation of the standard of professional learning and integrity so as to inspire the greatest degree of respect for the efforts and influence of the bar in the administration of justice and also to cultivate fraternal relation among its members."

The constitutions of the other associations are of kindred import and they all show a common purpose. Doubtless you

have observed that only in the St. Louis constitution is anything said about maintaining the dignity of the profession, and that and the Kansas constitution put no limitations upon themselves as to space. The constitutional objects are limited by the Missouri constitution to Missouri, and by the American constitution to America. Not so of your state and my city association. No pent-up Utica confines our powers; the boundless continent is ours. In view of the broad powers of their constitutions it might be said of your and my association something like George William Curtis, after his return from his first trip abroad, said of the Hudson river: "There may be larger, wider, swifter and deeper rivers, but none so lordly in its bearing and no other which moves in such majestic state on its march to the sea."

The bar associations of America are, in their plans and organizations, not dissimilar to our union of states, one central organization analogous to our national government; and state, territorial, county and city associations like our state, territorial and municipal governments. May they be as harmonious and as indestructible, each independent and yet each dependent on the other. They should revolve in their respective orbits, each aiding and inspiring all the others. Through them the American lawyers can be brought in touch with each other and our profession fixed as a distinct part of the body politic, as definitely known and seen as the governing officials, the Army, Navy or Church with even more important functions than the first two and second only to the last. We can trust to the wisdom of their memberships that there will be no suppression of the individual lawyer, but that he will be preserved with all of his independence and splendid manhood. The day was when it was prouder to be a Roman than a king. The day is and should ever be when for our profession it is prouder to be a lawyer than any other. I do not mean to disparage any other profession or vocation. I mean to say that lawyers,

without egotism, are to be satisfied with their own profession, proud of and loyal to it, supremely conscious that no other which touches only worldly affairs is its superior.

As the years roll by bar associations are increasing in numbers, importance and influence. Your own association at its organization counting only twenty-three, now numbers about two hundred and twenty.

The American Bar Association, starting in 1878 with a small membership, in 1900 numbered 1,514 members, and at its last meeting at Denver many new members came into the fold. Its membership is composed of able and representative lawyers from every state and territory in the United States, except Nevada. Ere long the lawyers of our insular possessions will be knocking at the door for admission, and the next cable may bring news of the organization there of local bar associations. If there are any associations where the membership is falling off and interest flagging, I have not had my attention drawn to them. It looks as if the morning of the bar associations is just fairly dawning, with the prospect of bright and glorious days to come.

Mr. Justice Brewer, before the American Bar Association at Detroit, in 1895, in his address: "A Better Education the Great Need of the Profession," after expressing the opinion that the poet's dream of the time

*"When the war drum throbs no longer and the battle flags are furled  
In the Parliament of man the federation of the world,"*

would not be realized, indulged in this glowing prophecy:

"I now look with the full assurance of faith to the dawning of a day when some great international court shall come into being whose judgments touching no questions between individuals shall determine all controversies between nations, and by such determinations bid the world's farewell to the soldier. But by whom shall such a tribunal be established, and who is

to sit therein and render the judgments which shall command such confidence and respect that willing obedience thereto be yielded by all? Out of the rich brain of our profession shall he wrought the form and structure of that court, its fashion and its glory, and the lawyers shall be the judges thereof."

We may and should federate the lawyers of our country through the bar associations, and later on the lawyers of all civilized governments.

This leads me to speak of some initiatory work looking to the commingling and interchange of views by the lawyers of the world, which is now devolving upon the American lawyers.

The centennial celebration of the Louisiana purchase is to be observed in St. Louis on a scale commensurate with the appropriate commemoration of the most significant event in the history of our Republic next to the Declaration of Independence, the adoption of the Federal Constitution and the inauguration of our national government with Washington as President.

Last summer it was determined by the committee on education of the Louisiana Purchase Exposition company, with the approval of the President and Directors of the company, that there should be held during the exposition an "Universal Congress of Lawyers and Jurists."

The purpose was announced through the medium of a memorial of the exposition authorities addressed and presented to the American Bar Association at its last annual meeting, at Denver, Colorado, and read by Charles Claflin Allen, of the St. Louis Bar, inviting the association to appoint a committee of representative lawyers from the different states and territories of the United States to assist in planning and arranging for such congress.

This memorial was referred to a special committee of nine, consisting of:

Hiram F. Stevens, of Minnesota.  
James Hagerman, of Missouri.  
Walter S. Logan, of New York.  
William A. Ketcham, of Indiana.  
Charles F. Libby, of Maine.  
Hugh Butler, of Colorado.  
Burton Smith, of Georgia.  
Adolph Moses, of Illinois.  
F. C. Dillard, of Texas.

Which, after due consideration, unanimously reported as follows:

*To the American Bar Association:*

"Your Special Committee on the Louisiana Purchase Centennial, to whom was referred the Memorial of the Exposition authorities advising of the contemplated holding of an Universal Congress of Lawyers and Jurists during the centennial celebration at St. Louis, Missouri, in the year 1903, and asking the co-operation and support of this Association in planning such congress, with the accompanying invitation for this Association to hold its annual meeting at St. Louis in that year, having carefully considered the same, are unanimously of the opinion that the encouragement and promotion of the holding of an Universal Congress of the Lawyers and Jurists of the world, such as contemplated by the Memorial, tends to further one of the principal objects of this Association, which, as its constitution declares, is 'to advance the science of jurisprudence.'

"The Louisiana Purchase Centennial has received liberal aid and encouragement from the National Government in the appropriation of \$5,000,000, which, with the \$11,000,000, provided by the city of St. Louis, its citizens and the state of Missouri, constitutes a guaranty of the Centennial Exposition itself, and the appointment of national com-

missioners to co-operate with the local management is an added assurance of the proper administration of the trust.

"We are advised that the educational forces of the world are to hold their meetings in St. Louis during the Exposition of 1903. The President of the United States has given further official sanction of the government to the Exposition in a proclamation issued to the Nations of the Earth, August 21, 1901, in which he says:

" 'In the name of the Government and of the people of the United States I do hereby invite all the Nations of the Earth to take part in the commemoration of the purchase of the Louisiana territory, an event of great interest to the United States and of abiding effect upon their development, by appointing representatives and sending such exhibits to the Louisiana Purchase Exposition as will most fitly and fully illustrate their resources, their industries and their progress in civilization.'

"We recommend the adoption of the following resolutions:

"1. *Resolved*, That a committee composed of one member from each state and territory of the Union and from the District of Columbia be appointed by the President of this Association to co-operate with the authorities of the Louisiana Purchase Exposition Company and the United States Commission having in charge the celebration of the centennial of the purchase by the United States from France, of the Louisiana Territory, in bringing about the holding of an Universal Congress of Lawyers and Jurists at St. Louis, Missouri, in 1903, on the lines proposed in the Memorial of the Louisiana Purchase Exposition Company presented at this meeting to this Association.

"2. *Resolved*, further, That the President and the Executive Committee of this Association be requested to take all necessary and appropriate steps to promote and carry out the plan of holding such Universal Congress of Lawyers and Jurists.

"3. *Resolved*, further, That a copy of these resolutions and the accompanying Report be transmitted by the Secretary to the Louisiana Purchase Exposition Company, and to the said United States Commission."

And the report and the accompanying resolutions were by the Association unanimously adopted. Since the adjournment, pursuant to the resolutions, Hon. U. M. Rose, of Arkansas, President of the American Bar Association, has appointed the following committee known as the Louisiana Purchase Centennial Committee:

Missouri,	James Hagerman, Chairman.
Alabama,	Thos. N. McClellan.
Alaska,	W. J. Hills.
Arizona,	John C. Herndon.
Arkansas,	Ben T. Duval.
California,	Chas. Monroe.
Colorado,	Hugh Butler.
Connecticut,	S. E. Baldwin.
Delaware,	George Gray.
Dist. of Columbia,	A. B. Browne.
Florida,	Benj. J. S. Liddon.
Georgia,	Burton Smith.
Idaho,	Bamford A. Robb.
Illinois,	Adolph Moses.
Indian Territory,	Clifford L. Jackson.
Indiana,	W. A. Ketcham.
Iowa,	O. P. Shiras.
Kansas,	Chas. B. Smith.
Kentucky,	E. F. Trabue.
Louisiana,	W. W. Howe.
Maine,	Hannibal E. Hamlin.
Maryland,	Louis E. McComas.
Massachusetts,	A. Hemenway.
Michigan,	Alfred Russell.

Minnesota,	H. F. Stevens.
Mississippi,	M. A. Montgomery.
Montana,	John W. Cotter.
Nebraska,	C. F. Manderson.
New Hampshire,	S. C. Eastman.
New Jersey,	R. Wayne Parker.
New Mexico,	T. B. Catron.
New York,	Walter S. Logan.
North Carolina,	Fabius H. Busbee.
North Dakota,	B. F. Spalding.
Ohio,	Judson Harmon.
Oklahoma Territory,	B. T. Hainer.
Oregon,	R. S. Bean.
Pennsylvania,	W. U. Hensel.
Rhode Island,	Jas. Tillinghast.
South Carolina,	T. Moultrie Mordecai.
South Dakota,	Bartlett Tripp.
Tennessee,	Ed. Baxter.
Texas,	F. C. Dillard.
Utah,	P. L. Williams.
Vermont,	F. H. Button.
Virginia,	R. C. Minor.
Washington,	G. M. Forster.
West Virginia,	R. Mason Ambler.
Wisconsin,	F. C. Winkler.
Wyoming,	C. N. Potter.

The Bar Association of the City of St. Louis having considered the proposed congress,—in full meeting assembled,—have cordially approved and commended the action of the Exposition Company and the American Bar Association in providing for this great educational event, so full of interest to the lawyers and jurists of the world, and have pledged the Association and its members to do all within their power to



assist in making the same a pronounced success, and have appointed a committee of nine, composed of:

A. M. Thayer, chairman; E. B. Adams, S. P. Spencer, Wilbur F. Boyle, A. G. Cochran, F. N. Judson, R. F. Walker, John F. Lee, H. L. Christie, to be known as Special Committee on the "Universal Congress of Lawyers and Jurists" to co-operate with the committees representing the Exposition Company and the American Bar Association and with the National Commission of the Louisiana Centennial in planning and holding such congress, and in addition have empowered its Executive Committee to do all things needful in promoting and holding such congress and also the holding of the annual meeting of the American Bar Association in St. Louis during the Exposition.

I am just advised by James L. Blair, General Counsel of the Louisiana Exposition Company, that President Francis, of that company, yesterday announced the appointment of a special committee for the company, on the "Universal Congress of Lawyers and Jurists," composed of the following members of the St. Louis Bar:

Henry Hitchcock, Chairman,	Eleneious Smith,
F. W. Lehmann,	Charles Claflin Allen,
John W. Noble,	Henry T. Kent,
James Hagerman,	John D. Johnson,
Chas. E. Pearce,	Paul F. Coste,
Gustavus A. Finkelnburg,	Richard B. Haughton,
R. H. Kern,	Thomas B. Harvey,
J. E. McKeighan,	George W. Taussig,
Shepard Barclay,	Arthur B. Shepley,
John H. Overall,	Albert Arnstein,
Franklin Ferriss,	James L. Blair,
Leo Rassieur,	E. J. Robert,
Horatio D. Wood,	Valle Reyburn,
Given Campbell,	Jacob Klein,

James A. Seddon,  
Isaac H. Lionberger.

Clinton Rowell.

I venture to suggest to the Bar Association of the State of Kansas here assembled that it would be well to consider during their present meeting what action, if any, should be taken by its members respecting this approaching Congress. I am sure any tender of suggestions or co-operation will receive a cordial welcome from those having the Congress in immediate charge.

In 1896 the then Chief Justice of England (Lord Russell of Killowen), in speaking to the American Bar Association, said "You are a Congress of Lawyers of the United States met together to take counsel in no narrow sense, on questions affecting the interest of your profession."

May I not say to you, paraphrasing the great advocate and jurist: You are a general assembly of lawyers of the State of Kansas, met together to take counsel in no narrow sense on questions affecting the interest of your profession, its honor and renown.

The plan and scope of the Universal Congress which is to be held has not as yet been further developed than as indicated in the memorial of the Educational Committee of the Louisiana Exposition Company, that it is to be composed of (1) lawyers and jurists from every nation of the world, (2) teachers of law and persons learned in special branches of jurisprudence, (3) persons learned in ancient law, including teachers of the History of Law and students of the laws of peoples and nations now extinct.

Gentlemen: The State of Kansas, of which you are citizens, stands proudly eminent for her ever-abiding and all-pervading interest in all matters pertaining to the intellectual and moral development of the human race,—she is the home not only of the fireside virtues, but of advanced and progressive

thought,—within her confines the forces working for better and higher education abound, and out of the brain and purpose of the Kansas Bench and Bar should come rich contributions to the plan and program of the Universal Congress of Lawyers and Jurists. It is hoped all the bar associations of our country and the lawyers not yet in the associations and the judiciary, State and Federal, will take a lively personal interest in making the congress a success.

The permanent record of the congress should produce a book for us and those who come after, at least equal in interest and value to that marvelously instructive book containing the proceedings of the Congress of religions, held at Chicago during the World's Fair. Such a book would be a kind of monument marking and honoring the associated efforts of the lawyers of the present, and pointing to their renewed associated work in the future.

In all the realms of existing legal literature there cannot be found a richer reservoir of everything pertaining to the interests of our profession than in the numerous annual publications of the state and territorial bar associations and of the American Bar Association. We find there speeches, addresses and papers by the most eminent of our profession here and in other countries, and reports and debates of the highest order. From them we can gather a consensus of opinion (as well as divergent views) on many questions affecting our profession. From the clash and conflict of mind meeting mind much truth has been, and much more will be, evolved.

Gentlemen: In this age of steam and electricity, when Shakespeare's dream has been realized by Puck putting a girdle "round about the earth in forty minutes;" wonderful material and intellectual development; general co-operative movements in all directions; far-reaching plans of expansion of territory and political power by the Nations and Republics, with their armies tramping all lands and their navies plough-

ing every sea; it behooves the lawyers to foster their associations that they may exalt their profession and its rightful power and influence among men.

My brothers, we belong to an order described by the illustrious French Chancellor "as ancient as magistracy, noble as virtue and necessary as justice." May we prove worthy of the high calling and in our day and generation do our part for its preservation and perpetuation! Are not bar associations the appropriate means to aid in accomplishing these ends?

If so, should not "The Lawyers" preserve, multiply, upbuild and support with all their might and earnestness these associations, till every true member of the profession round the globe finds in some or all a temple where he can devoutly contemplate the science of jurisprudence, and realize the truth of the almost divine utterance of Richard Hooker:

"Of Law there can be no less acknowledged than  
"that her seat is the bosom of God, her voice the  
"harmony of the world, all things in Heaven and  
"earth do her homage, the very least as feeling her  
"care, and the greatest as not exempted from her  
"power—"

and from which he can go forth like the knights of old, armed and equipped to do battle for the sacred cause of that legal and equitable justice which in civilized life is, and always will be, the chiefest concern of mankind?

## ASSESSMENT AND TAXATION.

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FREDERICK DUMONT SMITH.

The Kansas State Tax Commission of which I was a member, has recently completed its labors and submitted the result in the form of a proposed bill and a report thereon which I presume are in the hands of most of the members of this Association. It would be hard for me to say anything more upon the subject than I have already said in that report. I do not mean by that, that we exhausted the subject of assessment and taxation, but that that report covers measurably all that can be done or proposed under our constitutional limitations.

The Kansas Constitution limits us to a straight property tax levied equally and without discrimination upon all forms of property. We were therefore not in a position to consider experiments, doctrinaire theories, or changes of a radical kind. Our mandate from the Act which created the Commission was to revise the laws relating to assessment and taxation and especially to secure a more complete assessment of personal property. The tendency of tax discussion in the east where personal property has largely assumed the corporate form, is toward the abandonment of the straight property tax upon personal property and the attempt to secure its assessment by corporation taxes levied directly. In other communities, notably in Colorado, there is a tendency toward the same abandonment of the personal property tax, and its replace-

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ment by the single tax, or as it is there euphemistically called, a tax on land values.

We wasted no time in following these discussions, but bent ourselves to a consideration of the task imposed, the more complete assessment of personal property as well as the general revision and codification of all our tax laws.

The fundamental defects of our present system are, first, the assessment of property by an elective officer, who depends upon the people whom he assesses, for re-election and continuance in office. Second. The want of any adequate machinery to revise the assessments not only between counties, but between different classes of property in the same county, and third the lack of a court of appeals, removed from local prejudice, that should have power to correct abuses, remedy discriminations and generally supervise the whole wide reaching and complicated subject of assessment and taxation. This matter, one of the most important and highly specialized functions of government has been left to the most desultory and inefficient agencies. The officers having but little time from other duties to devote to it, and unable for lack of time to gain the essential knowledge, and without the power to use such knowledge even if gained.

To commence at the foundation we place the primary work of assessment in the hands of a county assessor, elected for four years, ineligible for re-election or to run for any office during his term. He is the responsible officer and he is clothed with powers sufficient to do the work and guaranteed emoluments ample to remunerate him. The distinction in such matters is that those who levy the taxes and spend the people's money should be closely responsible to the people, should have short terms and be often called to the bar of public opinion to account for their stewardship. While those who adjust the burdens, who do the assessing and so distribute the load of taxation should be as largely as possible independent

of those on whom the burdens are laid, and independent of those whom they assess. Thus the tendency of all modern tax legislation is toward a larger independence of the assessing officers. In Wisconsin their term is ten years. In Louisiana they are appointed by the Governor and everywhere that tax laws are revised the revision removes the assessor more and more from immediate dependence upon the people. Such independence must be coupled with a supervising power somewhere, as well as a pecuniary responsibility for the administration of his duties and this we secure, first by a bond given to secure all municipalities against loss by his willful failure to properly and fully assess and second by the power of removal for malfeasance or neglect placed in the state tax commission.

The actual work of assessment is performed by appointive deputies, none of whom is permitted to assess the district where he resides, thus removing him from local influences and affiliations.

The next step is the equalization by the county board, which we broaden by adding to the Board of County Commissioners the county clerk and the county assessor, expert officers who will greatly aid the board with their special knowledge.

We then create a state tax commission consisting of the state auditor, the state treasurer and the secretary of state, and two tax commissioners each elected alternately for terms of four years and having the pay and dignity of state officers. These two tax commissioners give their whole time to the subject of taxation. They are required to visit each county and see that the law is enforced. They are to keep in touch with the county assessors, by biennial meetings of the latter held at Topeka. They bring to the state tax commission all this special knowledge and information gained by their entire devotion to this one subject. It will thus be seen that this subject instead of being left to the cursory and infrequent

notice of officers whose time is fully occupied with other duties, is made the sole occupation of competent officers devoting to it all their time and skill.

The state tax commission so formed, equalizes the assessments of the various counties but its powers in that regard are greatly enlarged over the old state board of equalization. It may not only raise or lower the valuation of a county but it may lower or raise the valuation of any class of property within a county without disturbing that of other classes and above all its changes are made, not solely with reference to the basis for the levy of state taxes, but for the levy of all taxes. In short it may be said that there is no assessment for any purpose until the state tax commission has passed upon it and the assessment by it fixed, is the assessment for every purpose. In addition to that it is a court of error to which an appeal lies from the decision of the local board of equalization. Thus any person aggrieved by the action of the county board, may under proper restrictions and upon giving bond appeal to the state tax commission and have his grievance passed upon by a tribunal wholly free from local influences and prejudices. It frequently happens that local prejudice against an individual or corporation results in an unjust increase of his or its assessment. It as frequently happens that an individual or a corporation is so strong locally, so entrenched in political or other influence that it secures an unjustly low valuation, thus increasing the burden that other tax payers of that community must bear. We supply here a tribunal where such abuses may be promptly and cheaply corrected. It is a curious fact that up to this time no such tribunal of appeal has existed, while we allow the greatest latitude in appeal from the decision of almost every other inferior officer, board or tribunal in matters of far less importance.

The state tax commission also provides and enforces the use



of an uniform system of books and accounts in matters of taxation, and is clothed with power to remove any county assessor who refuses to obey the law or is derelict or neglectful of his duty.

This, briefly stated, is the new machinery of assessment. It is simple, compact and powerful. And while with the best of laws we must trust to fallible human instruments for success, and while we do not expect the new method to at once and by virtue of the law itself produce perfect results, we do believe that we have provided a nearly perfect machine and any failure in it must result, not from the machine itself but from those who use it. For forty years the present law has been at work producing inequalities and accustoming the public mind to evasion, injustice, fraud and downright corruption. We do not expect that this corruption will suddenly put on incorruption. We do not expect that the first assessment under the new law will arrive at perfection, or that any assessment will, but we are confident that we have so strengthened the hands of the assessing officers and equalizing boards, have so removed from them the present temptations to bargain and dicker for political and other advantages, so safe guarded the processes and methods of assessing and equalizing that in the hands of even ordinarily honest and competent men a great improvement must result.

It will be urged that we have created new offices and increased the expense. We admit it. As civilization becomes more complex we are constantly increasing the offices and the consequent expense of government. Government tends constantly to assume new functions and new instruments to perform those functions are necessary. In a hundred years our federal population has increased fifteen fold and our federal expenses have increased an hundred fold. Government more and more enters new domains, supervises and controls and oversees its citizens in ways undreamed of a hundred years

ago. To supply the cost of these increasing powers, and adjust their burden is now the most important problem that we have, and it would be the height of folly to so greatly increase every other function of government and yet be niggardly in that most vital of all functions, that which supports all the others. Taxation is the stomach of the governmental machine. It feeds and supports all the other members. We have increased all its other members and powers, multiplied its appetites and consumption and now we must attend to the stomach or the whole machine will fail.

No state that has revised its tax system has been able to avoid this increased expense, and in every case, where tax commissions have been created, the great increase in assessment, the broader base upon which the burden is laid, makes the increase unfelt and imperceptible.

For instance, there are upon every railroad in the state thousands of cars owned by private companies. Beer cars, tank cars, refrigerator cars for fruit and meat, and many others. They are protected by our laws but they pay not one cent of tax. Our law reaches them effectively and I venture to say that this one new subject of taxation alone will pay all the increased expense this bill may bring.

We formulate new rules for the valuation of corporate property so as to reach and assess the value of their franchises, a subject now untouched by tax, and so vastly increase the subject matter of taxation. We do this, keeping all the time within known and travelled limits and following precedents that have been approved by the Supreme Court of the United States. Thus with reference to telegraph and express companies, the assessment is based upon the relation that the length and value the lines in Kansas bear to the length and value of all the lines. Thus, if the length and value of the lines in Kansas be one twentieth of the length and value of all the lines of a telegraph or express company, then its valuation

in Kansas will be one twentieth of the total value of the stocks and bonds of such company. In establishing this new rule we have been fair to the companies, because we recognize the fact that a telegraph line, between Topeka and Liberal for instance, would not be as valuable as an earner of dividends, its franchise value, in other words, would not be as great as the same length of line in a thickly populated community like New York or New England. So we do not base the proportion solely upon length as is done in some states, but upon length and value combined. So we have been fair to the companies and fair to the state.

It has been asked why we did not base the railway assessment in the same way. We reply that the Supreme Court of the United States has expressly forbidden such a basis for railways. And this is because railway property differs widely from telegraph or express property. For instance the value of the Santa Fe stocks and bonds is made up not only of the value of its lines in Illinois, Missouri, Kansas and other states, but of vast and enormously valuable terminals in cities like Chicago, Kansas City, Galveston, Denver, San Francisco and other cities. Thus the Santa Fe owns in Chicago within the space of two miles, property easily worth six million dollars. When it has completed its terminal facilities in San Francisco it will have in the same space property that has cost the corporation ten million dollars or more. To assess it solely upon a mileage basis as compared with the value of its stocks and bonds would be to say that a mile of road in Kansas is worth as much as a mile in the city of Chicago. It would be in effect taxing property not within the limits of Kansas and the courts would not uphold it, in fact have not upheld it when the attempt was made.

Nor need there be any fear that under this law railway property will escape the general raise in valuation that must ensue from the law.

When the state tax commission comes to the task of equalizing property it will have before it the valuation of all other property in the counties of the state and the valuation placed upon railway property. It is given ample power to raise the valuation of railway property to correspond with any increase in the valuation of other property and it is expressly directed in the law to assess the value of the franchise of railway corporations. If the tax commission fails to do this in an equitable way, the people will have their remedy when the members of that commission return to them for re-election.

Numerous suggestions have been made to us regarding exemptions. In fact it might be said that every class of property in the state save real estate and railroad property has asked for exemption from taxation on one ground or another. Thus the money lender says that it is unfair to tax his mortgage, because he must loan in competition with money from New York and Massachusetts that goes untaxed in Kansas because its situs is elsewhere. We reply that the money lender has the protection of the law for his mortgage, and in fact it may be said that this class of personal property invokes the protection of the law and engages the time of courts to a greater extent than almost any other.

Why then should he not pay for that protection? It is also true that the foreign money that is loaned here is probably taxed somewhere, and it certainly is as to that loaned by insurance companies and savings banks which constitutes by far the largest amount. Of course a sufficient answer would be that the constitution would not permit such an exemption.

We have abolished the allowance of indebtedness against credits formerly allowed, because first it opened the door to fraud, and second it did not seem to us fair to allow one holding credits subject to taxation, to diminish his taxable substance by the deduction of credits and deny it to every other tax payer. Thus it would seem as equitable to offset a mort-

gage against the realty and assess only on the equity, and since to do this would open wide the door to fraud we agreed to deny all offset as the more equitable course. Again the plan of assessing realty only upon its equity, i. e., the value of the realty in excess of the mortgage debt has been thoroughly tried, notably in California and Missouri, and has resulted simply in a shifting of the burden back to the realty. The mortgagee collects the tax from the mortgagor in increased interest and hands it to the state so that in the last resort the realty continues to pay the whole tax.

It is said very plausibly that if A has a thousand dollars and loans it to B and takes B's note, there is no more value in existence than there was before, and that if we tax A's note and B's money it is double taxation. That one or the other should be exempt. We reply that both A's note and B's money, or that in which he invests the money, invoke and receive the protection of the law. A turns his idle money into a form of property that has an increment and should pay from that increment for the law's protection. B turns his credit into money which he invests in something that has an increment and he should pay out of that increment for its protection. True, it is double taxation in a sense but it taxes nothing that has not an existence as property, earning something, producing something and demanding and receiving the protection of government. Double taxation in some form cannot be absolutely avoided without permitting a vast amount of interest-producing property to wholly escape the burdens of the commonwealth. We are at a loss to know why the wealth that is loaned upon use, that produces an income substantial in character and certain in return, whose protection constantly engages the attention of the courts and involves expense and loss to the state, should shirk all burdens of government, while the farmer, the small home owner and he who makes two blades of grass grow where one grew before, bears it all. In a word, we are not single taxers.

It may be as some theorists claim, that the general property tax can never be enforced with absolute equity. It is an axiom of the law that no system of taxation can be absolutely fair and equitable.

Hardly a decided case upon the problems of taxation can be cited that does not advance and endorse that statement. Yet while that is true we believe the straight property tax is the fairest and most equitable system that can be devised. In theory at least it is the only fair and equitable system and if it has so far failed to work even a moiety of equity, we believe it is because it has not been fairly tried with adequate machinery of sufficient power to compel the full listing and assessment of its more evasive and fugacious forms. Before we are willing to consign the general property tax to the limbo of governmental failures, we want it tried by competent and efficient executive processes.

The new bill places a tax of five per cent upon collateral inheritances above the sum of five hundred dollars. We apply it only to collateral inheritances, because in direct descent, inheritances are most frequently the joint production of heir and ancestor. Passing to collateral heirs it is something unexpected, to which the devisee has contributed nothing and so passing the tax is held to be rather a license to take under the protection of law than a tax.

We have changed the laws relating to the collection of taxes, sale for delinquent tax, time and manner, form and effect of tax deeds but little, first because there was but little complaint as to these provisions, and second because the general public had become accustomed to and familiar with the present law and it ought not lightly to be disturbed. Again the courts have fully explored and interpreted the present statute and to disturb it without some good reason would merely unsettle things without any benefit in return. We have added a remedy to those now held by tax deed holders that

we believe is equitable and of benefit. As it now stands the holder of a tax deed out of possession must gain possession within two years or bring a possessory action. To do this he must bring ejectment and assert his tax deed as a fee simple title. When he fails to establish it as such, as is usually the case, the costs are taxed to the deed holder and in many cases these costs amount to more than the profit on his deed. True, he is given a lien and may have the property sold, but it is a losing transaction for him. We permit him to set up his tax deed as a lien, which is all it is in most cases, have it foreclosed and the property sold. Thus he secures either a title or his money and the costs are paid by the defaulting property owner. This is no great hardship to him and protects the deed holder from loss.

There are a great many minor changes in the new law that will be apparent only to the trained lawyer. We have shortened and simplified definitions. Stricken out and eliminated useless phraseology, made the law conform to the decisions of the courts, interpreting it where its meaning was doubtful and in every way endeavored to make the statute carry plainly upon its face, the full measure of the obligations imposed and remedies given, so that both can be ascertained by the average officer from the statute itself without resorting to interpretory decisions.

We have endeavored to arrange the whole statute in a logical and consecutive way, each step following in its natural sequence, so that any one familiar with the successive processes of taxation can readily turn to the part he wants.

We have eliminated provisions like the power of compromise given the county commissioners, that have not worked well in practice, and substituted remedies more exact and proven by experience to be more certain and free from fraud or corruption.

In conclusion we present the new bill, not as a perfect measure, not as the last word that may be said on taxation nor as the finality in a tax system, but as the result of earnest conscientious effort to find the best, and as embodying the most thoroughly tested and proven parts of the most successful tax laws of the various states.



## THE EDWARD THOMPSON PRIZE THESIS.

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[The most meritorious of the papers of the Senior Class of  
the State University Law School, in contest for the prize.]

A. L. BILLINGS.

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### I. SUBJECT.

May a school board of a public high school in the state of Kansas require a pupil to take elocution contrary to the expressed wishes of the parent?

### II. THESIS—Affirmative.

A school board of a public high school in the state of Kansas *may* require a pupil to take elocution contrary to the expressed wishes of the parent.

### III. ARGUMENT—Outline.

1. The constitution and school laws of Kansas provide in a general way for an uniform system of common schools, which includes the high schools of the state.
2. Kansas courts nor legislatures have never specifically determined the point put in issue by the Thesis.
3. The common law obtains in Kansas in aid of the general statutes.

4. The common law rule as applied to the common schools of the state, applies with equal force to the public high schools of the state..

5. The common law rule applicable to the Thesis, sustains and affirms the Thesis.

#### IV. BRIEF OF THE THESIS.

1. The constitution and school laws of Kansas provide in a general way for an uniform system of common schools, which includes the high schools of the state.

2. The common law obtains in Kansas in aid of the general statutes.

3. Kansas courts nor legislatures have never been called upon to specifically determine the point put in issue by the Thesis.

4. The legislature has authorized the school authorities to regulate and control the schools under their jurisdiction.

5. The acts of the school boards within their jurisdictions are as binding upon the beneficiaries of the common school system as if they were enacted by the legislature itself.

6. The parent by interfering in or with the management of the school forfeits his privilege of keeping his child in school.

7. The board may adopt any study not prohibited by the state (or United States) constitution, or state (or Federal) laws, and may require the use of the study (adopted) by pupils competent to take it.

8. Exceptions to the rule are due to the anomolous wording and interpretation of the general school statutes upon which they depend.

9. For a school board to require a pupil to take elocution is proper and legal, and within their power.

10. The common law rule applicable, sustains and affirms the Thesis.

## V. PLAN OF THE THESIS.

1. Preface.
2. Part One of the Thesis: The Kansas Constitutional Provision.
3. Part Two of the Thesis: Kansas Statutory Provisions.
4. Part Three of the Thesis: Kansas Cases Reviewed.
5. Part Four of the Thesis: The Common Law Rule as to Other States.
6. Part Five of the Thesis: Application of the Rule to the Thesis.

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## THE THESIS.

**PREFACE.** The common law of England as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people shall remain in full force in aid of the general statutes of this state; and all such statutes shall be liberally construed to promote their object, and is still in force in Kansas.

Tousley v. Galena Mining Co., 24 Kan. 328.

State v. Calhoun, 50 Kan. 530.

In re. Gunn, 50 Kan. 218.

And so in seeking a judicial determination of matters arising under the constitution and laws of Kansas, where the general laws are neither explicit nor definite, the legal determination must yield first, to the legislative construction and judicial interpretation; and second, to the conditions and wants of the

people as aided and defined by the common law. Neither the Kansas legislatures nor the courts have as yet expressly, and "in haec verba," determined whether or not "a school board of a public high school in the state of Kansas may require a pupil to take elocution contrary to the expressed wishes of the parent." Mindful of this fact it will be the purpose of this paper to establish the affirmative thesis by setting forth and discussing the provisions of the state constitution, of the state school laws, and of the few Kansas judicial decisions that in any way approach the proposition; and to evolve the common law rule applicable from the judicial decisions of other states; and finally to apply the common law rule evolved to the proposition or thesis under consideration.

#### THE KANSAS CONSTITUTIONAL PROVISION.

The state of Kansas maintains an uniform system of common schools by authority of the state constitution. Art. 6, Sec. 2. ["The legislature shall encourage the promotion of intellectual, moral, scientific and agricultural improvement by establishing an uniform system of common schools, and schools of a higher grade, embracing normal, preparatory, collegiate and university departments."] High schools have been judicially determined to be a part and continuation of the common school system of this state.

Knowles v. B'd. of E'd., 51 Kan. 804.

Koester v. Com. of Achison, 44 Kan. 141.

Eichholz v. Martin, 59 Kan. —

Horton J. in Knowles v. B'd. of E'd. (supra) said: "In the Act of April 7, 1867, Chap. 122, Art. 10, Sec. 4, the legislature includes high schools as a part of the common school system of this state. Nothing forbids the legislature from establishing common schools having graded or high school departments. If all such grades or departments are maintained and regulated in accordance with the provisions of this Act as

common or public schools, they are necessarily a part of the common school system of this state." And since the city high schools derive their sustenance from the Act establishing the common school system, they must necessarily be a part of the system in order to share in the common school fund.

#### KANSAS STATUTORY PROVISIONS.

Kansas general school laws establish and regulate the common schools. (Sections refer to Dassel's General Statutes of Kansas). The Act of April 7, 1867, provides for the establishment and regulation of the common schools. [The following sections have special reference to the thesis. Sec. 5998 provides that in each and every school district shall be taught orthography, reading, writing, English grammar, geography and arithmetic; and such other branches as may be determined by the district board, provided that instruction in the several branches taught shall be given in the English language. Sections 6050, 6088, 6103 and 6127 provide for the establishment of grade and high schools under the common school system in the districts and cities of the state. Section 6229 provides for the establishment of county high schools. Section 6240 provides that the Board of Trustees of the county high school may make rules as to *entrance requirements*, and provided that no pupil shall be admitted who has not passed a *satisfactory examination* in *all the work* of the *district school*. Section 6242 provides for compulsory obedience to the rules and regulations of the high school on the part of the pupils. Section 5988 provides that district boards may suspend pupils from the privileges of the school guilty of persistent disobedience or violation of the rules and regulations of school.] The purposes of this Act of April 7, 1867, lead directly to the conclusion that the legislature intended an uniform system of common schools, in which certain branches shall be taught; and such other branches as the board may adopt, provided that instruction shall be in the English language, that the

common schools shall be equally free and accessible to all alike; that the schools shall be under the direct control of the district boards, who shall have the power to say what studies shall be taught in addition to those prescribed by law; and to make all rules and regulations necessary to a properly conducted school; to expel from school pupils who persistently disobey the rules of school; that the boards may grade and classify the common schools; and finally that the public high schools are but a part and continuation of the common school system and the fact that a public high school is higher than a district school does not remove it from the common school system.

#### KANSAS CASES REVIEWED.

In *Knowles v. B'd. of E'd.* (before cited) one point of contention was whether or not a public high school was a part of or included in the common school system. Held: that it was. Horton J. in the opinion of the court said: "In the Act for the establishment and regulation of the common schools, although the title refers to the common schools, the legislature includes high schools as a part of the uniform system of common schools. There is nothing in the constitution which forbids the legislature from establishing common schools having high school departments." Continuing Horton reviewed *Koester v. Com. of Achison* (*supra*) and said: "This case only holds that county high schools are but a part and continuation of the common school system of this state." (*Do. Eichholz v. Martin*, 59 Kan. 106.) Thus far it has been shown that the Kansas public high schools, whether district, city or county, are but a part and continuation of the common school system, by the provisions of the constitution; by the provisions of the Act of April 7, 1867, and by the judicial interpretation of both the constitution and school law.

The Act above cited provides that certain branches shall be taught, and such other branches as may be determined by the

board, provided that instruction shall be in the English language. As to what study may be adopted, that is left to their judicial determination. In *Donahoe v. Richards*, 38 Maine 379, a certain text book legally adopted by the board was objected to by the parent. The court in the opinion said: "The right to prescribe the general course of study must exist somewhere, as well as the power to direct what books shall be used. The legislature have seen fit to repose the authority to determine this in the several school committees. They therefore may rightly exercise it. So in this case, the same general and extensive power over the subject matter is granted, and the course of studies and books prescribed by the school committee are to be regarded as if prescribed and established by the act of the legislature. The power of selecting includes that of making injudicious and ill-advised selections; but there is no right of appeal, the selection is binding and conclusive. The children may even be required to read the works of Strauss, Bentham or Hume. If a committee acting within their authorized limits shall make an unwise or improper selection of books, there is no right of appeal, there is no judicial power to correct it. If a child can successfully object to the reading of a book, it can likewise object to hearing it read for the same cause; and thus the power of selecting books is withdrawn from those to whom the law intrusts it, and the right of negation is transferred to the scholars. The right as claimed undermines the state. It is that the will of the majority shall bow to the conscience of the minority. Nor is this all, if the child shall have power to choose his studies, then while the laws are made by those of full age, the right of obstruction, of interdiction is given to any and all children of howsoever immature an age or judgment. Gibson C. J. in 2 Penn. and W. 412, said: "'Salus populi suprema lex' is an universal maxim, but when the liberty of conscience would interfere with the paramount rights of the public, it ought to be

restrained." [The school board may legally adopt the following studies:

- Grammar, *Trustees v. People*, 87 Ill. 303.
- English Composition, *Guernsey v. Pitkin*, 32 Vt. 224.
- Bookkeeping, *Rulison v. Post*, 79 Ill. 567.
- Rhetoric, 29 ———, 29 Ohio 89.
- Bible, *Donahoe v. Richards*, 38 Me. 379.
- Religious exercises, *McCormick v. Burt*, 95 Ill. 379.
- Algebra, *State v. Mizner*, 50 Ia. 145.
- Debate, *Bradford v. School*, 36 S. E. 920.
- Music, *State v. Webber*, 108 Ind. 31.
- Vocal Training, *Knowles v. B'd. of E'd.*, 51 Kan. 803.

From these cases it is clear that a board may adopt any study not forbidden by law or constitution.] Now, since the high schools are a part of the common school system, and school boards under the common school system may in reality adopt any study they may legally adopt, then they may legally adopt elocution. Having adopted elocution the question arises may they legally require pupils possessing necessary mental and physical qualifications to take the legally adopted study? In answering this question it will be necessary to pass to the next division of this paper.

#### THE COMMON LAW RULE.

The school statutes of practically all the states give the school boards power to make all reasonable rules and regulations they may deem necessary for the proper government and control of the school, and power to enforce these rules and regulations. Suppose that a parent should demand that his child be taught arithmetic only, when his child cannot even read; or that his child be excused from taking reading, arithmetic, rhetoric, music, or elocution because the parent wanted it so; or that his child be permitted to eat apples in time of school because it only concerned his child and not the



other pupils. It is evident that the child or parent cannot avoid all rules, and that the right to say what is a reasonable rule does not lie in the child or parent. But there is a power to which the child and parent may come with their excuses and petitions and be heard, and that power is the authority the legislature has delegated to the school boards.

The judicial decisions of the different states, with the anomalous exceptions of Illinois and Nebraska, are unanimous in their holdings that a common school pupil when once within the jurisdiction of the public schools must be obedient to the reasonable rules of that school; and that to require a pupil to take and pursue grammar, reading, geography, composition, rhetoric, German, algebra, music, vocal training or what ever study legally adopted or in use in school, is a reasonable rule; that pupils when competent to take a certain study, such as the school authorities provide for all of a certain grade of pupils, of which said child is one, may be required to take said study even as against the expressed wishes of the parents, and that nonconformance with these rules subjects both parent and child to be deprived of school privileges. Illinois and Nebraska hold anomalous positions in regard to the school rights of the parent, but not so in the light of their school statutes. The states holding to the rule, including Kansas, provide in their school law that certain studies, specifying them, *shall be taught*, and such other studies as the board may adopt. The Illinois statute provides that the common schools shall be *for instruction in certain studies*, etc. The reason, therefore, for the departure from the rule is to be found in the wording of the Illinois school statute. In *Powell v. B'd. of E'd.*, 97 Ill. 375, it was held that every school established under this statute shall be *for instruction in* the branches provided for the teachers, and that drawing and vocal music are not prohibited from being taught in the common schools. *Rulison v. Post*, 79 Ill. 567, holds that pupils in the common

schools are not required to take any study enumerated in the law, although not prohibited by it. And in *Trustees v. People*, 87 Ill. 303, it was held that the trustees could not compel a child to pass an examination in grammar as a condition precedent to his admission to the school. (But compare Sec. 6240 of the Kansas statute ante, to the contra.) These holdings are consistent with the provisions of the Illinois school statute, which says "common schools shall be for instruction in," etc.

Nebraska in *State v. School District*, 48 N. W. 393, is another exception to the rule. This case held that a parent or child could successfully object to taking grammar in the high school. But this case cannot apply to Kansas for the basic school law is not the same in the two states. The Nebraska school law provides "that the board shall have power to classify the scholars and to grade the schools, and cause them to be taught in courses of study and text books prescribed *for the use of the school.*" Under the wording of that statute, the parent had a legal right to veto any or all studies. The schools are established *for the use of* the school patrons. The parent's reason for objecting was that grammar was not taught as it was when he went to school! For any court to uphold a system of schools founded upon such untenable grounds or such shallow reasoning is not in strict keeping with the scientific and intelligent developement of modern jurisprudence.

*Morrow v. Wood*, is a case sometimes cited erroneously, as against the rule. Barrett J. in *Ferriter v. Tyler*, 48 Vt. 470, reviewing *Morrow v. Wood*, 35 Wis. 59, said: "This case is not in conflict with the rule. The case turned upon the point, who had the power to govern the school, the school authorities or the parent? It was held that the power lay in the board, and that in the *absence of a rule by the board* the teacher had no right to expel a pupil from school because he did not

wish to study geography in accordance with the expressed wishes of the parent. But *if the board had made such a rule, then the decision would have been different.*" Thus these apparent exceptions are not hostile to the rule, but only conform to the school statutes upon which they depend—statutes which evidently have failed the purpose for which they were intended. This view is strengthened by the fact that no other states have passed such lax and self-destructive school laws.

Now, turning to the cases that support the rule, as laid down by the thesis, there is abundant authority in its support. Indiana stands flat-footed upon the proposition; and it is to be noticed that all the state school statutes holding to the rule are similar to the Kansas statute. In *State v. Webber*, 108 Ind. 31, the court said: "The city of Laporte adopted a rule requiring each pupil to procure a certain music book and to employ a certain period of time in the study thereof. The school superintendent, notwithstanding the expressed wishes of the parent to the contrary, required the pupil to take part in the musical exercises, and upon the pupil's refusal to obey, suspended him from the school." The court sustained and authorized the suspension and said: "The important question arises, which should govern the public schools of Laporte as to the branches to be taught and the course of instruction therein, the school trustees to whom the law has confided the direction of these matters, or the mere arbitrary will of the relator without cause or reason in its support. We are of the opinion that only one answer can or ought to be given to this question. The arbitrary wishes of the relator in the premises must yield and be subordinated to the governing authorities and to their reasonable rules and regulations for the governing of the schools."

*Guernsey v. Pitkin*, 32 Vt. 224, holds that a pupil may be required to take and write English compositions, and for refusal be expelled. In *Donahoe v. Richards* (ante) the court

by Appleton J. in reference as to whether a pupil may be required to take and use a certain text book said: "If the right to direct a certain course of study and the books to be used is given to the board the right to enforce obedience to the determining power manifestly exists, or the determination will be ineffectual. It would be worse than idle to grant the power to direct if any one can set at naught the action of the committee. The committee may enforce obedience to any or all regulations within the scope of their authority. If they may select a book they may require the use of that book selected. If the plaintiff may refuse reading in one book she may in another unless for some reason she is exempted from the duty of obedience. If she may refuse to obey one requirement rightfully made, then she may another, and then the discipline of the school is at an end." [In *Sherman v. Charleston*, 8 Cush. 165, Shaw, C. J. said: "This power exists in the committee and is of a judicial nature." And again in *Stephenson v. Hall*, 14 Barb. 222, he said: "If the board acted in good faith and in the exercise of their duty they are protected." In *Bradford v. School*, 36 S. W. 920, it was held approving *B'd. of E'd. v. Purse*, 101 Ga. 422 (post), that "these obligations (rules and regulations) are inherent in any proper school system and constitute, so to speak, the common law of the school, which every pupil is presumed to know and is subject to it." Rogers on Domestic Relations, Sec. 473, says: "A parent may ordinarily delegate part of his authority over his child to the instructor or tutor. And extends it only to such as is necessary to properly school the student and may be exercised to the extent reasonably necessary and proper to induce obedience to the reasonable rules of the teacher and proper application in the studies assigned to the child."] In *State v. Mizner*, 50 Iowa 145, Seevers, J. said: "If, therefore, the rules adopted by the teacher required that the prosecutrix should study algebra and be in attendance afternoons, and

that a proper discipline and the good of the school required an enforcement of the rules, we think that the teacher should have told prosecutrix that she could not attend school unless she was prepared to obey the rules in this respect." In *B'd. of E'd. v. Purse*, 101 Ga. 422, the Georgia Supreme Court discusses at length the rights of the parent, child and the school authorities. Cobb, J. rendering the opinion of the court said: "The board has a right to exclude any pupil, who either himself or his parent so conduct themselves that their acts are calculated to break down and destroy discipline in the school room." Quoting Blackstone, 1 Com. 781, "At common law the child had no right to demand an education from the parent. Education was only a duty at the common law which the parent owed to the child, and if the parent refused to educate the child could not complain in court. Perhaps it was punishment enough for the parent that his child should be uneducated." The child has a right to be admitted to the public schools, which by permission of the parent is enforceable at law. But the right to enter the school is one thing, and the right to regulate his studies and conduct after he is admitted is quite another and a different thing, [as is tersely shown by the Indiana Supreme Court in *State v. White*, 82 Ind. 462.] The regulation of the public schools is within the domain of the legislature, and there the central power resides. *State v. Hayworth*, 122 Ind. 462.

But says Cobb: "The legislature has authorized the local authorities to exercise control as to school government and control. It is the right of the state through its properly constituted authorities to require of the parent that he do nothing inconsistent with the peace and good authority of the public schools provided for his benefit. The right of the child to attend school is dependent upon the good conduct of both parent and child. Both must submit to the reasonable rules and regulations of the school, and for all school purposes the

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teacher is *in loco parentis*." (State v. Burton, 45 Wis. 150.) The court adopts these words of Ex-Chief Justice Bleckley: "It is certain that the parental discretion can keep the child out of school; can it be exercised in keeping it in school? If so, then the whole field of discretion is covered by the parent's will, and a very limited part by public authority. Where a scheme contemplates joint effort, if one of the parties refuses to co-operate on reasonable terms, the other may refuse to co-operate on any other terms."

[The following cases hold that boards may make rules and regulations concerning the following subjects, and are reasonable:

- Attendance, Ferriter v. Tyler, 46 Vt. 470.
- Attendance, King v. Jefferson City, 71 Mo. 628.
- Moral character, Sherman v. Charleston, 8 Cush. 160.
- Moral character, Spiller v. Woburn, 12 Allen 127.
- Vaccination, Bissell v. Davidson, 65 Conn. 183.
- Vaccination, Duffield v. Williamsport 162 Pa. 476.
- School reports, Bourne v. State, 35 Neb. 1.
- Private school, Fessman v. Seeley, Tex., 1895, 308 S. W. 268.
- Grammar, Guernsey v. Pitkin, 32 Vt. 224.
- Algebra, State v. Mizner, 50 Iowa 145.
- Music, State v. Webber, 108 Ind. 31.
- Vocal training (any study), Knowles v. B'd. of E'd., 51 Kan. 803.

"In the above cases," said Cobb, continuing, "it is true some act was done by the child itself, but the act of the child was generally in obedience to some command of the parent, and the expulsion of the child from school was brought about by the requiring of the child by the parent to do some act which was contrary to the rules of school." Says Cobb, "Our conclusion is that the board may either in the absence of, or in the furtherance of some rule, have the right to exclude from the

public schools under its control any pupil whose conduct or parent's conduct was calculated to produce disorder in the school room and break down and destroy discipline. In such a case it is not only proper but it is the duty of the board to expel such a child from school."

#### APPLICATION OF THE RULE TO THE THESIS.

Knowing that the Kansas state constitution and school law provides in a general way for the establishment and regulation of an uniform system of common schools, which includes the public high schools of the state; and that the specific point whether or not the board may require a pupil to take elocution contrary to the expressed wishes of the parent, has never been judicially determined in this state; and knowing that the constitution expressly provides that the common law shall apply where the general laws are not specific on any given point, it has been our endeavor to find the common law rule applicable to the thesis. The common law rule is found to be universal in its application, in harmony with the Kansas school statute, and is as follows: "That a school board cannot legally refuse to admit a proper child to the public school; but when the child is once admitted to the school, the pupil becomes impliedly, subject to and obedient to, and the parent impliedly acquiesces in, the legal authority delegated to the school board by the legislature, and in control of the school." This delegated authority includes the power by the board to adopt any study (including elocution) at their judicial discretion; and to make whatever rules and regulations they may deem necessary to the proper government of the school. The application of this rule to the thesis is at once apparent. The Kansas constitution provides that the common law shall be in aid of the general statutes, and so it is. The general statutes establishes the schools and the common law supplies them many working details. The common law is the perfection of human reason, and so the common school system is the per-

fection of human experience in school craft. In the great structure of jurisprudence, what is more beautiful than the plan upon which it is constructed! The master minds planned the great capitol, setting off apartments for this division of law and courts for that division. But to the finishers—the artificers and artisans—was left the work of fitting out and completing these, according to the wants and conditions of the occupants. One of these apartments is typical of the common school system. The general statutes are the master-builders, and the common law is the finisher, preparing for the use of the common people.

Again, the common schools are as broad on their foundation as are the other great institutions of our country. In the common schools, instruction is provided for the masses, and is regulated by state authority, so that the greatest good can be given to the greatest number. If a parent desires to educate his child in a manner provided by law for all children, then well and good; but if he desires that his child be educated along certain lines or in a special manner different from that prescribed by law for all children, it is his legal right to so educate, but he must educate elsewhere than in the public schools, and at his own expense. It would be as rational for the parent to object to the operation of any other municipal law as the school law. The objecting parent as well as other school patrons seem to regard the school room as a forum where he may crowd and jostle in, and there administer his kind of justice irrespective of the rights of the public. Few persons of educational experience will seriously contend that the school authorities under the direction of the law are not better qualified to direct the education of the masses, than the thoughtless parent who objected to his child studying grammar for the reason that grammar was not taught as it was when he went to school.

Finally, it is not to be seriously questioned which shall be



employed in determining the point at issue—whether it shall be the common law rule that prevails universally in the states whose school statutes are worded similar to the Kansas school statute; or whether it shall be the exception to the rule which is vouched for by two states, whose school statutes are worded radically different from the Kansas statute. Surely it shall be the common law rule whose purpose is to carry into completion and perfection the intent and purposes of the founders of the common school system in establishing a system of schools for the educating and making of good, intelligent, law-abiding citizens, and not for the satisfying of personal whims or prejudices—too frequently fostered by petty school district quarrels—of rebellious children or obstinate parents.

## PROBATE COURTS.

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SIDNEY HAYDEN.*Mr. President and Gentlemen of the Bar Association:*

The framers of our Constitution saw fit to invest the judicial power of this state in a Supreme Court, District Courts, Probate Court, Justices of the Peace, and such other courts inferior to the Supreme Court as might be provided by law. And further provided that there shall be a Probate Court in each county, which shall be a court of record, and have such probate jurisdiction and care of the estates of deceased persons, minors, and persons of unsound mind, as may be prescribed by law, and shall also have jurisdiction in cases of *habeas corpus*. That this court shall consist of one Judge, who shall be his own clerk, and hold his office for two years, and hold court at such times, and receive for compensation such fees as may be prescribed by law. Like all other judicial positions in this state the Constitution does not prescribe any qualifications for the incumbent of the office except that of citizenship. The legislature in its infinite wisdom, in chapter 25 of the General Statutes, relating to counties and county officers, has enacted three sections in regard to the Probate Court. The first provides for the election of a Probate Judge, and his giving a bond for the faithful performance of his duties. The second that he shall keep a record of all business done by or before him, and provides for his compensation.

The third that a vacancy in the office may be filled by appointment by the Governor, and in this section for the first time we find that in case of a vacancy some "suitable" person must be appointed, and in Jackson County I know that that provision of the statute has been literally complied with, for in a case where there was a vacancy and the Governor filled the same by appointing a "suitable" person the appointee, realizing that he was simply filling a vacancy, during his incumbency signed all orders, and spread the same upon the records of his court, affixing thereto the title "Probate Judge *de bonis non*."

The Supreme Court of this state as far back as the 12th Kansas, in the case of *Young v. Ledrick*, decided "That a Probate Judge may receive judicial powers other than those granted by the Constitution to the Probate Court." If this is true, and it is cited approvingly by a long line of decisions down to the 55th Kansas, why would it not be in the power of the legislature to grant to the Probate Judge additional powers and make a respectable court out of it? And in addition to the jurisdiction which he already possesses give to the Probate Judge such original civil jurisdiction up to a thousand dollars, and criminal jurisdiction in cases of misdemeanors, with such a fair salary attached thereto that a competent lawyer could afford to hold the office. As lawyers we all know that in the minds of a large number of people there seems to be a general understanding that as soon as a man is elected to a judicial office by some occult power he at once becomes endowed with all the requisite knowledge to fill the position, and that the moment a person becomes comfortably seated in the Probate Judge's chair, he is by reason of his being there, qualified to advise widows, minors, heirs, executors, surviving partners, administrators, trustees, legatees, devisees, and even persons contemplating matrimony, as to their rights, powers and duties. This is not an overdrawn statement, and as a

general rule the Probate Judge feels the same way about it, and no matter what his previous occupation may have been after he has glanced through the Statutes concerning executors and administrators, etc., he accepts the judgment of parties having business in his court in respect to his ability to decide all questions of law and fact as final and conclusive and proceeds Solomon-like to give advice and deal out justice that is very often fearfully and wonderfully made. Again, as a result of this in many counties of this state it has become the practice for the Probate Judge to act as the attorney for parties having business in his court, to draft petitions for appointment of executors and administrators, examine attesting witnesses in respect to proving wills, and in fact draw petitions for sale of lands, etc., prepare annual and other accountings for executors and administrators, and other papers which can only lawfully be prepared by the party, or his attorney, and which it is his official duty to afterward pass upon. This practice, of course, is in direct violation of section 357 of chapter 31 of the Statutes concerning Crimes and Punishments, which provides "That hereafter it shall be unlawful for Probate Judges or Justices of the Peace to write any petition or answer, or other pleadings in any proceedings, or perform any services as attorney and counsellor at law in any case or cases pending before them, or to be interested in any profits or emoluments arising out of any practice in their own courts, except costs." Perhaps no active practicing lawyer has any reason to have any mercenary objections to the violation of this Statute, for like the man who draws his own will a Probate Court, run after the manner I have described, is the lawyers' best friend. But for the due administration of justice, and to protect a class of people who in their non-age or inexperience have duties suddenly thrust upon them by reason of the death of some parent, or husband, this practice ought to be stopped, and such legislation ought to be enacted as would

absolutely prohibit any Probate Judge from preparing any paper, or advising any party having business in his court, upon any subject which may afterward come before him for his judicial determination. As illustrating the evil consequences which result from this kind of procedure let me call your attention to a case which occurred in my own practice. A man died testate. By his will he devised and bequeathed all of his property, both real and personal, to his wife during her natural life time or so long as she should remain his widow. After his death the widow appeared before the Probate Court and produced the will. The Probate Judge advised her that under the terms of the will she could hold the whole of the property during her natural life and was also entitled to one-half of it absolutely. She thereupon elected to take under the will. About a year afterward, like some other widows, she changed her mind and concluded she would re-marry. Thereupon the children brought an action of partition. The widow appeared in court, filed an answer claiming that she elected to take under the provisions of the will because of the erroneous advice given her by the Probate Judge as to her rights under the law, and asked that her election be set aside and that she recover one-half of the real estate. Upon the trial she proved her contention to the satisfaction of the District Court, the Probate Judge appearing as her witness, and with judicial solemnity testifying in her behalf that he advised her she could hold all of the property during her natural life, no matter whether she re-married or not. This is no isolated case, and I have no doubt but what nearly every member of this association can recall some similar transaction.

Referring again to the accounts of executors, etc., for the protection of all parties interested there ought to be some provision of the Statute which can be successfully enforced whereby it is made the duty of the Probate Judge to require all executors, administrators, surviving partners and guardians

to make annual settlements. We all know that the provisions of the existing Statutes in this respect are not complied with, and that these persons in many instances are allowed to let matters rest in their hands for years without rendering any account of their stewardship, and when finally called upon to render an account their vouchers are lost, or misplaced, their report is doctored up by the Probate Judge, or some attorney, and many transactions which were honestly made, and which if embodied in an annual report would have been satisfactory to all parties, by reason of lapse of time have a suspicious look, are incapable of a satisfactory explanation and often lead to almost endless litigation.

Like all other tribunals in the United States Probate Courts are creatures of the Statute, but their present functions are largely borrowed from and are moulded after the English Ecclesiastical Courts and the precedents of the common law ought to afford great aid to them in the discharge of their important functions. It is claimed that statistics show that all American and English estates, in fact the property of the civilized world, pass through the hands of a court of this character every twenty-five years, and in a number of the states the courts hold that the probating of wills, and granting of letters of administration is exclusively confined to such courts and their action cannot be reviewed by *certiorari* or writ of error. Of course in this state appeals are allowed from the decision of the Probate Court to the District Court in all cases where there shall be a final decision of any matter arising under the jurisdiction of the probate court, except in cases of *habeas corpus* and injunction.

But even in states where an appeal lies to courts of general jurisdiction Courts of Chancery constantly refuse to relieve parties from fraud or mistake against the judgment of the Probate Court in setting aside wills probated, even when the will probated was forged. The records of the Probate Court,

as all other courts of record, import absolute verity if it is upon a subject matter on which it is empowered to act, and the weight of authority seems to be that they are courts of general jurisdiction in respect to such matters. Hence the necessity for their decree being binding upon the world and they should be entitled to the same respect and presumption of conclusiveness as to the legality of their proceedings as any court of record. They have complete jurisdiction over all matters entrusted to their charge, and when their jurisdiction appears the recital of the facts upon which it rests is no more essential than it is in a case of a Federal Court.

Of course it goes without saying that a person ought to have the absolute right to appoint his own executor, but where a person dies intestate instead of the provisions of the existing Statutes—which provide in substance that the administration upon the estate of an intestate shall be granted in the following order: First, his widow or next of kin, or both, as the court may think proper; or Second, in case they are incompetent or evidently unsuitable to discharge the trust, or neglect for twenty days after service of a citation, without a sufficient cause, to take administration of the estate, to one or more of the principal creditors, if there be any competent and willing to undertake the trust; and Third, if there be no such creditors and the court is satisfied that the estate exceeds the value of one hundred dollars, to such other person as the court shall deem proper—it would, in my opinion, in a great majority of estates be far better to commit the administration to a public administrator, a person elected in each county, who would be a sworn official, and who would be required to give a good and sufficient bond, in some reliable surety company, for the faithful performance of his duties.

In at least one respect there ought to be additional legislation enacted by which the Probate Courts of this state can enforce their orders and judgments. Unless it be by the in-

herent power which they have as a court of record there is no authority for them to enforce their orders. They probably have power to punish for contempt for disobedience of their writs, processes, decrees and orders, but there is no provision by which an execution or other process can issue to collect their own fees, or costs made in proceedings had before them. And there ought also to be some provision by which a person making a claim against an estate should be required to give security for costs in case he fails to establish his claim. As the law now stands a party may file a claim against an estate and there is no provision of law, in case he is defeated, by which the estate may recover from him costs made necessary in defending the same, unless it be by an action in some court of competent jurisdiction.

As the state grows older, wealthier and wiser the business in the Probate Courts will constantly increase. Even at the present time the value of property rights adjudged and determined by the Probate Courts in many of the counties exceeds the amounts litigated in the District Courts, and the necessity of having a good lawyer elected to fill the important position of Probate Judge will become more and more apparent.



## DELAYS AND TECHNICALITIES IN THE ADMINISTRATION OF JUSTICE.

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R. M. PICKLER.

The delays of the law have afforded a tempting target for the gibes of the profession, as well as for the multitude.

One eminent judge has characterized the tireless speech of an advocate as "The last hair on the tail of procrastination." "Tedious!" said Lord Cockburn, "He not only exhausts time but encroaches on Eternity."

But even these petty insignificant delays are not always the fault of counsel.

Jeremiah Mann once said of a certain judicial appointee, "He will make a slow judge. He will have first to decide what's right and then to decide whether he will do it."

One of the amusing incidents that brighten the solemnity of the Supreme Court occurred when Justice Miller undertook to arrest the flow of eloquence of an attorney who was arguing his first case on appeal from the Circuit Court. The young man was declaiming at the rate of one hundred and fifty words per minute on some of the simplest principles of the law when Miller interrupted the speaker in a sarcastic tone, inquiring, "Will not the learned Counsel consider that time is precious and give the Court credit of knowing at least the rudiments of the law?" "I beg the pardon of your Honor," replied the attorney in his blandest manner, "but I made that mistake in the lower court."

In a trial case some time since the counsel, making an argument to the Court from an entirely untenable position, was so informed by his Honor. In a few moments he again started along the same line when the Court inquired testily, "What do you think I am here for?" and the counsel, with a good humored twinkle of the eye, softly replied, "Indeed you have me there, your Honor."

We read in an authority still daily consulted, I presume, by every member of the Bar Association that a long time ago the unfortunate Cain was interrogated as to the whereabouts of his brother. He was not yet accused of any crime; but to this momentous question he answered, "Am I my brother's keeper?" It was the first recorded instance of bad pleading. The first failure to state with certainty the accusation, and a lamentable neglect, from an artistic standpoint, to meet the issue even as tendered.

When Themistocles was told that he would govern the Athenians extremely well if he would but do it without respect of persons he said, "May I never sit on a tribunal where my friends shall not have more favor than strangers."

To compel an offender or wrong-doer to meet the charge without delay, and to so shape the law that his right of person and property will be determined before a court absolutely impartial to all, has ever been the desire of the patriotic lawyer and statesman.

Macauley tells us that the trial by single combat obtained great credit among the war-like Gauls, who were great admirers of physical courage. They did not believe that a brave man should suffer death or that a coward deserved to live. They went out upon the battle field and first imploring Heaven to witness the justice of their cause, fought until the stars appeared in the evening, or until the death or discomfiture of an adversary. Both in civil and criminal proceedings the plaintiff or accuser, the defendant and even the witnesses

were exposed to mortal challenge from an antagonist destitute of legal proofs, and they were compelled either to desert their cause or publicly maintain their honor in the lists of battle; and the decree of the lance or sword was ratified, as they claimed, of Heaven, of the judges and by the people. It meant that no strong man could be wrong and no weak man could be right, and the force of the brute was finally supplanted by the reason lodged in His image by the giver of all good and grand and noble things.

Perhaps there is still living a class of litigants whose disputes deserve settlement in this good old ancient form, and in no other; and such settlement possibly might be welcomed with ecstasies of delight and indifference as to results. But it was wrong in principle and had to go, and, outside of Texas, Kentucky and Galena, Kan., it is not recognized law in this country, and even in these places it was probably recognized as a cumulative, and not exclusive remedy.

Many practitioners seem to believe the whole soul of the law is embodied in its technicalities, and devote a most prodigal outlay of industry to discover the manner in which a rule may with plausibility be perverted. A striking illustration coming to notice was that of a gentleman endowed more with assurance than learning. He accepted a desperate defense in the early part of last November, made strict examination of the proceedings and told his client, then in jail, that he proposed to "bust the papers". On the day of trial he came into court with his client and filed a demurrer to every praecipe filed by the County Attorney for the witnesses for the State.

It does not follow, however, that the lawyer inclined to indulge in technicalities is less able to select the ground of vantage in waging battle upon the merits of the controversy. Some of the most learned and versatile are the most punctiliously exacting. Speaking of one of this class, a judge before whom he once practiced, Abraham Lincoln said, "He is one

of the most learned men I have ever known, but he holds the most extreme ideas of rigid government and close construction. It has been said of him, he would hang a man for blowing his nose in the street, but he would quash the indictment if it failed to specify which hand he blew with."

To the beleagured defendant, gazing with affright at the meshes closing in upon him, it yet remains that he need respond only to a judgment lawfully obtained; and being bankrupt in excuses sounding in conscience is it a matter of wonder that the wide domain of speculation is traversed, and all the impediments conjured up by a fertile brain are interposed to block the course of the law? Is it astonishing the wheels of justice have been slow? Is it a matter of surprise that we hear of patient little Miss Flite waiting around the Court of Chancery for the decree which never comes? Or that the man from Shropshire should be exiled so long from the hearing so indignantly and vehemently demanded? Or that the wards in *Jarndyce vs. Jarndyce* should be made to suffer the penalties of hope long deferred?

When Salon proposed to place the laws of the Athenians in writing, Anacharsis, on finding it out, laughed at the absurdity of imagining he could restrain the avarice and injustice of his citizens by written laws, which in all respects, he said, resembled spider's webs, and would, like them, entangle and hold the poor and weak, while the rich and powerful broke through them. To this Salon replied, "Men keep their agreements when it is an advantage to both parties not to break them," and he would so frame his laws as to make it evident to the Athenians that it would be more to their interest to observe than to transgress them.

For the first time the laws to be obeyed by the English people were enacted in the English tongue in 1484. But beyond this, they were the first laws in England ever printed. That the matters adjudicated, as well as the manner of settlement,

should be preserved in writing and the oral pleadings abandoned is entirely natural; but the excessive regard for pure formalities which followed would be difficult of appreciation at the present day. The utmost precision as insisted on in the Roman law is certainly amazing to the modern student. The latter day practitioner would probably file his pleading with some trepidation if informed, as Gaius tells us the Roman lawyer was assured, that the most trifling mistake would lose his suit.

In the Procedure by *Formulæ* the issue which the *Judex* decided was made up by the *Prætor* in writing from the statements of the parties before him. The *formulæ* was a summary of the facts in dispute in technical language with instructions to the *Judex* and that part of the *formulæ* which contained the plaintiff's claim was called the *intentio*. Any equitable defense to the *formulæ* was set up by way of an *exceptio* which was either peremptory, denying the right of the plaintiff to recover at all, or dilatory, denying only that the action could be brought at the time or by the particular plaintiff. The plaintiff might meet the *exceptio* with a *replicato*; the defendant, on his side, might set up a *duplicatio*, and the plaintiff might then traverse the *duplicatio* with a *triplicatio*. Beyond this stage, sadly remarks the historian, the pleadings were not named, although we infer that, like the brook immortalized by England's lamented laureate, they might go on forever.

So it is not surprising that we should be told by Gibbon that in the decline of Roman Jurisprudence the ordinary promotion of lawyers was pregnant with mischief and disgrace. The noble art which had once been preserved as the sacred inheritance of the patrician fell into the hands of freedom and plebeians, who, with cunning rather than with skill, exercised a sordid and pernicious trade. Some of them procured admittance into families for the purpose of fomenting differences, of encouraging suits and of preparing a harvest of gain

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for themselves or their brethren. Others, recluse in their chambers, maintained the dignity of legal professors by furnishing a rich client with subtleties to confound the plainest truths, and with arguments to color the most unjustifiable pretensions. The splendid and popular class was composed of the advocates who filled the forum with the sound of their turgid and loquacious rhetoric. Careless of fame and justice they are described for the most part as ignorant and rapacious guides who conducted their clients through a maze of expense, of delay and of disappointment from which, after a tedious series of years, they were at length dismissed when their patience and fortunes were almost exhausted.

The Germans who exterminated Varus and his legions had been particularly offended with the Roman laws and lawyers. One of the barbarians, after the effectual precautions of cutting out the tongue and sewing up the mouth of one of this class, observed with much satisfaction that the viper could no longer hiss.

When we consider the tenacity with which we cling to the old forms and superstitions we can easily understand why advancement in the administration of the law has been of slow growth.

Over fourteen years ago a form for deeds of conveyance was adopted by the Legislature of our state. If followed, the ordinary instrument would probably consist of less than one hundred words and would cost to place of record, including the acknowledgement, not more than forty cents. I call to mind the satisfaction expressed by the Senator, the author of the bill, when it was considered and unanimously recommended for passage by the Committee on the Judiciary. It encountered no opposition. It passed both Senate and House almost unanimously. It is, and has been ever since its enactment, a dead letter. It only encumbers the volume in which it is printed, and the old forms with their sonorous amplitude

of useless verbiage are still universally employed. The words, "This Indenture" and "together with the lands, tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining" are too firmly wedded to the hearts of our countrymen to become dislodged by the mere enactment of a law declaring them useless.

But in the ripeness of age the changes do occur. In turning to our Code and contrasting it with the rules of old we are almost startled at the havoc wrought by our Legislature. We conclude that at some time our law-making body, impatient and disgruntled at the old order of things, has ridden roughshod over forms and objects heretofore considered sacred. They have declared that in writing a Petition in Ejectment it is sufficient to state that the plaintiff has an interest in and is entitled to the property, and that the defendant unlawfully keeps him out of possession. He can join with it an equitable action to correct a deed; also, he can recover for mesne profits, and can litigate until all parties are weary of the controversy. This much was wrought out by our Legislature undismayed, and then, as if aghast at such sacrilegious work, it apparently proceeded to compromise with its conscience by retaining and pointing to the good old safeguard of allowing the defeated party another trial for the simple asking. This is a queer yoking up of the antiquated and the modern—the quick with the dead.

Our Code affords ample provision for new trials where it is proper to grant them, and the lawyer in active practice is convinced I think, that the one overshadowing visible effect of the retention of this old rule is to postpone the actual trial of the real issues in controversy, and amounts simply to a delay of justice. Some day an enterprising young statesman with more courage than veneration will rise "to introduce a bill" and the "other trial" therein mentioned will wend its way to join the misty shadows of the past.

All through the Code we see the scars left by the pruning knife and the grubbing hoe. A suitor is admonished to tell his tale in plain and concise language. There is little left to remind us of the old common law pleadings, the declaration plea, replication, rejoinder and rebutter so closely resembling the Roman practice. The defendant can admit or deny it, or tell why and how the difficulty arose and state his excuse, if any. The plaintiff then has one remaining chance of showing on paper that, notwithstanding the answer, the defendant is liable. Here the literary portion of the entertainment ceases, and the beginning of the end is inaugurated. It is difficult to conceive of a system of pleading more simple and efficient.

And in our equity practice we can pour out the burden of the soul in causes as varied and in stretches as eternal as the imagination can conceive and the typewriter can execute, and send it trickling down in one continuous stream into that limitless receptacle, the conscience of the Court, where every sorrow incapable of erasure by an ordinary action can there find its lasting surcease. All this, too, unvexed by any wave and scarcely vulnerable to any kind of a motion.

Through the centuries the old trunks have been toppling.

Only a short time ago our own Supreme Court had the audacity to say that henceforth in an action by a parent for the seduction of a daughter it is not necessary to show that the daughter had been acting in the capacity of a servant before recovery can be had by the head of an outraged family. And yet, how long have we endured this senseless fiction?

In a sister state now in my mind it is not necessary, in opening up hostilities, to file any kind of a pleading. The plaintiff simply sends a copy of the petition to the offender stating that he intends to file it on a certain date. The offender then serves on the would-be plaintiff the pleading he proposes to file, should such a calamitous event occur. The plaintiff replies in like manner, and it often happens, after the



sweet and softening influences of blessed slumber, the dyspeptic condition of the stomach is alleviated, the pain subsides, the semi-circle in the spine is ironed out, the matter is adjusted to the satisfaction of all parties concerned, and both are profoundly grateful that no court costs have been taxed, and in their hearts pronounce benisons on the head of the genius smart enough to devise a method by which a man can be conducted around, and about, and experience all the delights and luxuries of the court room, without having beheld even the form thereof.

Again under our flexible Code the plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they arise out of the same subject of action. We are all aware of the suit of Hamar Bros. Brogan & Sons and the M. K. & T. Ry. Co., against all of whom a recovery was sought as joint wrongdoers in shipping diseased cattle and thus communicating Spanish or Splenic fever, and in which a multitude of parties were made parties defendant, and in which one hundred and fifty-six verdicts were rendered against the Railway for different defendants asking affirmative relief by the same jury.

In the case of Scarborough vs. Smith, tried so long ago, the Court, by Justice Valentine, after remarking that it was hard to tell just what kind of a case was sought to be commenced, found before the end of the investigation that in this state a cause of action for the recovery of real property could be united with an action for the rents and profits of such property; also, in the same suit, partition of the property could be had; and all this whether plaintiff was or was not in possession of the property sought to be partitioned.

In an action for the recovery of specific personal property the plaintiff may write the simple allegations required in a suit of replevin, and under a general denial the defendant

can run the gamut of all the defenses known to the law, or to the outlaw, including the claim of the rankest fraud, without a hint to the plaintiff as to the nature of the defense until it is encountered for the first time on the trial. Certainly this is simplicity of a verity and with vengeance; and around it all falls the protection of the statute, even, to the encouragement of the ignorant, the negligent and the slothful pleader. But understand me, this is not a criticism. Lord Ellenborough once regretted the change that compelled lawyers to plead in English instead of Latin and laid himself open to the charge of being an old fogey.

In this state delays should rarely occur through the so-called technicalities of the law. They *will* arise, however, in the pathway of the ignorant practitioner. The matter may be summed up thus: If I succeed in ousting my opponent upon some unexpected point it comes of my superior knowledge of the law. If he ousts me it is because of his taking a mean and unwarranted advantage of a technicality.

But, as our friend Galileo once remarked, the world moves. In all the states the good work is going on. On every hand the dead limbs have fallen. The useless foliage is being constantly rent and torn aside. The world is restless for the accomplishment of reform. It is the march of progress. If justice is not swift at least in our own country we should be encouraged with its strides.

Let us turn to the criminal courts of France. I do not desire to call your attention to the fate of Dreyfus; but let us listen in amazement to the words of a trial judge, as, during the progress of a case in his court where a man is being tried for his life, he says to the prisoner: "Your pretended robbers only wounded you and did not kill you. Had I been in their place I would not have missed killing you, you may feel sure of that." And the audience in the court room began to yell with fury at the prisoner, "Kill him, kill him." This scene

actually occurred at the trial of Brierre at Chartres in France less than three months ago. Let us thank a beneficent God that we are permitted to live in free enlightened America.

I am not insensible while uttering this congratulation that within a few months the immolation of dusky citizens of the United States has been accomplished and that the ashes of a human being have floated from that awful relic of the savage, the blazing stake, down upon the wiry sods of the great western plain and have mingled with the brown waters of the Missouri. But these horrible scenes are the furious eruptions of unusual, abnormal and local disease, and do not receive countenance by our theory or genius of government.

It is a wondrous age in which we live. The glow from the friction of minds as bright as the flashing scimitar of a Saladin is illuminating the world—is laying bare precious truths—driving into murky corners the old wraiths and superstitions. Great intellects are searching the firmament; are clamorous for the secrets of the earth; are demanding transportation of the winds of Heaven; are harnessing the mighty cataracts; are enslaving the lightning's flash; thought is projected without support across the mighty oceans; from the cold impassive metallic foil leaps the voice of the child, the babble of age, the exclamations of ecstasy and the deep tone agony of the heart. Death comes. Yet the voice of the dead is not hushed. The world is brimming with a sweeter charity, a more generous sympathy, a broader and deeper christianity. In the language of a great lawyer, "Salvation, bursting from the sepulcher of the Lord westward, has belted the earth and is now returning to the cradle of its birth."

And in the fields of the law the cultivation has been commensurate with the march of civilization. The harvests are gathered with riper reason, with implements more speedy and sure, with more of the dignity and integrity which should ever attend the conscientious student and practitioner.

In the march of progress, in the great reforms, in the uplifting of humanity, the lawyer, the conscientious lover of his profession, steadily maintains the enviable place won by the Websters and Marshalls, who revered God, adored their country and were beloved of their fellow men.

## CONSTITUTION.

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ARTICLE 1. The name of the Association shall be The Bar Association of the State of Kansas.

ART. 2. The object of the Association shall be the elevation of the standard of professional learning and integrity, so as to inspire the greatest degree of respect for the efforts and influence of the bar in the administration of justice, and also to cultivate fraternal relations among its members.

ART. 3. The officers of the Association shall be a President, Vice-President, Secretary, Treasurer and an Executive Council of five members.

ART. 4. The President shall preside at all meetings of the Association, and shall open each annual meeting of the Association with an appropriate address. The Vice-President shall preside in the absence of the President; and in the absence of both, a president *pro tem.* may be elected by the meeting. The Secretary shall keep a record of all the proceedings of the Association, and conduct the correspondence of the Association.

ART. 5. The Treasurer shall keep an account of all funds of the Association. The Executive Council shall manage the affairs of the Association, subject to the Constitution and By-Laws.

ART. 6. A quorum for the transaction of business shall be twenty members.

ART. 7. No person shall be admitted to membership of

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this Association who is not a member of the Bar of the Supreme Court, and who has not been engaged in the regular practice of the law for one year next preceding his application for admission.

ART. 8. All applications for membership shall be referred to the Executive Council, who shall report the same to the Association, with their recommendation thereon; and no person shall be admitted to membership except by a two-thirds vote of the members present. Each member shall pay an admission fee of five dollars, and annual dues of three dollars.

ART. 9. The annual meetings of the Association shall be held in January of each year, at the Capital, at such time as the Executive Council fix. Thirty days' notice of the annual meeting shall be given by the Secretary. Special meetings may be called by the Executive Council, of which meetings thirty days' notice shall be given to the members by the Secretary.

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## BY-LAWS.

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SECTION 1. The Executive Council shall, on or before the first day of May of each year, designate such a number of members, not exceeding six, to prepare and deliver or read at the next annual meeting thereafter appropriate addresses or papers upon subjects chosen and assigned by the Council to each of said members, as may be so selected for such purpose.

SEC. 2. The order of exercises at each annual meeting shall be as follows:

1. Opening address by the President.
2. Consideration of applications for membership.
3. Reports of Secretary and Treasurer.
4. Report of Executive Council.

5. Reports of standing committees.
6. Reports of special committees.
7. Delivering and reading of addresses and papers.
8. Miscellaneous business.
9. Election of officers and delegates to American Bar Association.

SEC. 3. There shall be chosen by ballot, at each annual meeting, three members as delegates to American Bar Association for the ensuing year.

SEC. 4. All addresses delivered and papers read before the Association, the copy of which is furnished by the author, shall be lodged with the Secretary. The annual address of the President, the reports of committees, and all proceedings of the annual meeting, shall be printed; but no other address delivered or paper read shall be printed, except by order of the Executive Council.

SEC. 5. The terms of office of all officers elected at any annual meeting shall begin at the adjournment of such annual meeting, and end at the adjournment of the next annual meeting. And in case of any vacancy, the Executive Council shall appoint some member to fill the vacancy, who shall hold until his successor is elected.

SEC. 6. The Treasurer's accounts and reports shall be examined annually by the Executive Council before their presentation to the Association, and the Executive Council shall report the result of such examination of Treasurer's report and accounts to the Association at its annual meeting.

SEC. 7. The Executive Council shall cause to be printed such a number of copies of the proceedings of its annual meeting as it shall deem best, not exceeding one thousand copies, and shall distribute the same to members of the Association, and to such other persons, or associations, or societies, as they may deem prudent; and shall, with the proceedings of each annual meeting, print the roll of active and honorary

members of the Association, and its Constitution and By-Laws.

SEC. 8. Every member of the Association shall pay to the Treasurer on or before the first day of May of each year, (after the year of his admission), annual dues of three dollars. All members who have not paid their annual dues on or before May 1 shall, within thirty days thereafter, be notified of this fact by the Treasurer and requested to forthwith comply with the requirements of this by-law.

SEC. 9. The Secretary shall keep a "general membership roll" on which shall appear in alphabetical order the name of every member of the Association from its organization, with the date of his admission.

The Secretary shall also keep an "honorary membership roll" to be composed of those members who shall be specially designated for this honor, by resolution of the Association on the formal written recommendation of the Executive Council.

The Secretary shall also prepare on the first day of March in each year, the "roll of active members" of the Association for that year, which shall include only those who have paid to the Treasurer their Association dues for the preceding year and the new members by whom no dues are payable for that year.

SEC. 10. The Treasurer shall, twenty days before the first day of March in each year, notify all active members in arrears for the dues of the preceding year, that the roll of active members for the year, to be printed in the Annual Report of the proceedings, will be made up on that date, and that their names must be omitted from that published roll of active members, unless their delinquent dues have been paid.

SEC. 11. Only the active and honorary members of the Asso-



ciation shall be entitled to participate in the proceedings of the Association, or to a seat at its annual banquet.

SEC. 12. On the general membership roll opposite each name omitted from the active membership roll, shall be noted the reason for such omission—whether death, non-payment of dues, or personal request.

SEC. 13. Any member whose name has been omitted from the active membership roll for non-payment of dues, may have his name restored to such roll by the payment of the years' dues for which he is in arrears.

SEC. 14. The standing committees of the Association shall consist of the following:

Judiciary Committee—Five members.

Committee on Amendment of Laws—Five members.

Memorial Committee—Three members.

Committee on Legal Education and University Law  
School—Five members.

**ADDRESSES DELIVERED BEFORE THE KANSAS STATE BAR  
ASSOCIATION FROM 1886 TO 1902.**

- Ady, J. W.—1888, *Taking the Case From the Jury*.  
Alden, H. L.—1896, *The Lawyer, and His Relation to Society*.  
Allen, Stephen H.—1899, *The Federal Judiciary*.  
Bergen, A.—1897, *Abraham Lincoln as a Lawyer*.  
Billings, A. L. (Student State University)—1902, *May a School Board of a Public High School in the State of Kansas Require a Pupil to take Elocution Contrary to the Expressed Wishes of the Parent*.  
Bowman, N. L.—1901, *Divorce*.  
Brewer, David J., Washington, D. C.—1886, *Libel*; 1895, *Some Thoughts About Kansas*; 1895, *The Federal Judiciary*.  
Burris, John T.—1899, *International Arbitration*.  
Calderhead, W. A.—1895, *Our Clients*.  
Carter, Peyton, (Student State University)—1901, *The Doctrine of Locus Poenitentiae*.  
Coleman, C. C.—1900, *The Evolution of a World Power*.  
Cunningham, E. W.—1901, *Marshall as the Expounder of the Constitution*.  
Dean, O. H., Kansas City, Mo.—1900, *The Development of the Private Corporation*.  
Doster, Frank—1887, *The Relations of Lawyers to Society and Their Clients*.  
Eaton, D. W. (Student State University)—1895, *Combinations in Restraint of Trade*.  
Ellis, A. H.—1896, *Mistakes of Law and of Lawyers*.  
Ewing, Thomas, Jr., New York City—1890, *Judicial Reforms*.  
Farrelly, Hugh P.—1900, *The Legal Aspect of Trusts and Their Control*.  
Foster, C. G.—1898, *The Pardoning Power—Its Use and Abuse*.  
Games, John I. (Student State University)—1898, *A Discussion of the Eleventh Amendment*.  
Garver, T. F.—1886, *Our Jury System*; 1893, *Uniformity of State Laws*; 1895, *Bench and Bar*; 1899, *The Kansas Court of Appeals*.  
Gillpatrick, J. H.—1889, *The Counter-Claim*.  
Gleed, Chas. S.—1891, *Western Railway Troubles*; 1899, *The Government of Cities*.  
Gleed, J. W.—1897, *The Other Side of Corporations*.

- Godard, A. A.—1894, Municipal Bonds.
- Graves, Charles B.—1894, Shall Jury Trials be Abolished in the United States?
- Green, Geo. S.—1892, Review of the Legislation of the Several States During the Past Year.
- Green, J. W.—1892, Legal Education.
- Grosscup, P. S., Chicago—1898, Popular Self-mastery—The Duty of Lawyers Towards Its Promotion.
- Guthrie, John—1890, Powers and Duties of the Judiciary; 1891, Conciliation and Arbitration.
- Guthrie, W. F.—1893, Report of Committee on Legislation to Control and Regulate Admissions to the Bar.
- Guthrie, W. W.—1897, The Lawyer and His Relations.
- Hagerman, James, St. Louis, Mo.—1902, Lawyers and Bar Associations.
- Hamilton, Clad—1895—Our Legal Alma Mater.
- Hayden, Charles—1887, The Judicial Administration of Justice.
- Hayden, Sidney—1902, Probate Courts.
- Henry, John W., Kansas City, Mo.—1896, The Bench and Bar.
- Hessin, John E.—1892, Fraud Through the Confidential Relationships.
- Hogg, Archie, (Student State University)—1896, What Have Been the Potent Factors in Moulding Modern Law?
- Holt, W. G.—1898, The Jury System.
- Hopkins, Scott—1888, Punishment—Degree and Measure.
- Horton, Albert H.—1888, The Proposed Constitutional Amendment; 1887, The Death Penalty in Kansas; 1891, Limitations upon Appellate Courts.
- Houk, L.—1891, Courts of Conciliation.
- Hubbard, Nathaniel M., Iowa—1888, The Dramatic Art in the Jury Trial.
- Humphrey, James—1892, Legal Education and Qualifications for Admission to the Bar; 1894, The Position and Influence of Lawyers.
- Johnston, W. A.—1889, The State Bar Association; 1892, Supreme Court Records.
- Kellogg, L. B.—1886, The Supreme Court.
- Kimble, Sam—1901, Address, President's Annual.
- Kingman, S. A.—1890, An Address.
- Kyle, Harry G., (Student State University)—1899, Hypnotism as a Defense in a Criminal Action.
- Martin, David—1897, The Proposed International Court.

- Martin, F. L.**—1897, *Criticism of Courts and Juries.*
- Milliken, John D.**—1891, *Creation of an Intermediate Appellate Court;* 1893, *The Treatment of Crime;* 1895, *Address, President's Annual;* 1901, *The Early Days of Marshall.*
- Mills, F. D.**—1897, *An Elective Judiciary.*
- Moore, E. W.**—1892, *The Need of a Constitutional Convention.*
- McCleverty, J. D.**—1892, *The Supreme Court Records and Reports.*
- McFarland, J. D.**—1901, *The Common Law in Kansas.*
- McLean, Henry**—1898, *A People-Made Constitution.*
- McNeal, T. A.**—1889, *The Compensation of Lawyers.*
- O'Bryan, Ed.**—1895, *The Lawyer in Politics.*
- Otis, A. G.**—1900, *The Status of Prisoners in the Kansas Penitentiary. Under Death Sentence.*
- Overmyer, David**—1889, *The Legal Profession—Its Duties and Obligations to Society.*
- Parker, J. W.**—1900, *Kansas Probate Courts.*
- Peck, Geo. R.,** Chicago—1886, *Codification;* 1899, *The Judge, the Lawyer and the Citizen.*
- Perkins, Lucius H.**—1898, *A Study in the English Constitution;* 1901, *Corporal Punishment for Crime.*
- Perry, W. C.**—1895, *Some Desirable Amendments to Federal Statutes.*
- Phillips, Oliver C. (Student State University)**—1897, *The Devotion of Private Property to a Use in which the Public has an Interest.*
- Pickler, R. M.**—1902, *Delays and Technicalities in the Administration of Justice.*
- Porter, Silas**—1899, *Jeremy Bentham;* 1902, *Taxation of Franchises.*
- Pownall, H. F., (Student State University)**—1900, *The Constitutional Right of Congress to Refuse a Seat to a Member Elect Presenting a Valid Certificate of Election.*
- Robinson, E. F.**—1893, *If Not, Why Not?*
- Rogers, Henry Wade,** Chicago—1894, *The Law-making Power.*
- Rossington, W. H.**—1888, *Federal and State Jurisdiction;* 1900, *The Legal Aspect of Trusts and Their Control.*
- Sluss, Henry C.**—1887, *Judge and People;* 1896, *The Intent of the Framers;* 1901, *John Marshall.*
- Smith, Wm. R.**—1896, *The Ordinance of 1787.*
- Smith, Chas. W.**—1899, *Centralization of Political Powers.*
- Smith, Fred Dumont**—1902, *Assessment and Taxation.*

- Spencer, C. F.—1898, *The Law and the Agitator*.  
Spilman, Robert B.—1894, *Naturalization Laws*.  
Stanley, W. E.—1902, *Pardons and Paroles*.  
Thacher, Solon O.—1887, *The Higher Law*; 1888, *Milestones of the Law*.  
Thompson, Seymour D., St. Louis—1892, *Abuse of Corporate Privileges*.  
Thomson, Wm.—1896, *The Prisoner at the Bar*; 1898, *Not to the Victors*.  
Valentine, Daniel M.—1892, *Municipal Government*; 1895, *The Supreme Court*.  
Wall, T. B.—1891, *Descents and Distributions*; 1901, *The Bankruptcy Act of 1898*.  
Webb, W. D.—1886, *The Integrity of the Legal Profession*.  
Wells, Frank—1901, *Unanimity Verdicts*.  
Whiteside, H.—1894, *Should the Present System of Jury Trials be Abolished in the United States?*  
Williams, A. L.—1890, *Memorial Address, J. P. Usher*; 1896, *A Jeremiad*.  
Williams, F. L.—1898, *The Law of Impeachment*.

(N)



## PUBLISHED ROLL OF MEMBERS.

### HONORARY MEMBERS.

Hon. David J. Brewer.....	Washington, D. C.
Hon. Henry Wade Rogers.....	Chicago
Hon. Seymour D. Thompson.....	St. Louis
Hon. John W. Henry.....	Kansas City, Mo.
Hon. Nathaniel M. Hubbard.....	Iowa
Hon. P. S. Grosscup.....	Chicago
Hon. Samuel A. Kingman.....	Topeka
Hon. Thomas Ewing, Jr.*.....	New York City
Hon. L. D. Bailey*.....	Lawrence, Kan.
Hon. O. H. Dean.....	Kansas City, Mo.

\*Deceased.

### ACTIVE MEMBERS.

Adams, John W., Wichita.	Brice, Harry, Cimarron.
Allen, S. H., Topeka.	Brooks, J. E., Sedan.
Allen, W. S., Newton.	Brown, C. L., Arkansas City.
Austin, E. A., Topeka.	Brown, J. U., Hutchinson.
Benson, A. W., Ottawa.	Brown, Milton, Topeka.
Benton, C. E., Fort Scott.	Bucher, Chas., Pawnee, O. T.
Bergen, A., Topeka.	Bullen, B. T., Belleville.
Berger, A. L., Kansas City.	Burch, R. A., Salina.
Bird, W. A. S., Topeka.	Burdick, Wm. L., Lawrence.
Bone, H. J., Ashland.	Burgess, H. L., Olathe.
Bowman, C. S., Newton.	Burris, Jno. T., Olathe.
Bowman, Harry C., Newton.	Calderhead, W. A., Marysville.
Bowman, Noah L., Garnett.	Campbell, Altes H., Iola.
Boyle, L. C., Kansas City, Mo.	Clark, Ansel R., Sterling.
Branine, C. E., Newton.	Clark, Geo. W., Topeka.
Branine, Ezra, Newton.	Codding, J. K., Westmoreland.

- Coleman, C. C., Clay Center. Herrick, R. T., Topeka.  
 Crain, John H., Fort Scott. Hessin, Jno, E., Manhattan.  
 Cunningham, E. W., Emporia. Hick, R. S., Westmoreland.  
 Dana, A. W., Topeka. Higgins, W. E., Lawrence.  
 Dassler, C. F. W., Leavenworth. Histed, Clifford, Topeka.  
 Davis, J. W., Greensburg. Holt, W. G., Kansas City.  
 Dean, J. S., Marion. Hooper, W. W., Leavenworth.  
 Dewey, T. E., Abilene. Hopkins, Scott, Horton.  
 Dillon, W. T., Belleville. Horton, A. H., Topeka.  
 Dooley, H. C., Coffeyville. Houston, J. D., Wichita.  
 Doster, Frank, Topeka. Hunt, J. L., Topeka.  
 Eckstein, O. G., Wichita. Huron, G. A., Topeka.  
 Ellis, A. H., Beloit. Hutchison, J. G., Emporia.  
 Evans, W. F., Topeka. Iams, Rezin, Clay Center.  
 Farrelly, H. P., Chanute. Jackson, A. M., Leavenworth.  
 Ferry, L. S., Topeka. Jetmore, A. B., Topeka.  
 Foster, F. H., Topeka. Johnson, Frank O., McPherson.  
 Freeman, C. E., Topeka. Johnston, W. A., Topeka.  
 Frith, J. Harvey, Emporia. Jones, Howel, Topeka.  
 Garver, T. F., Topeka. Jones, John J., Chanute.  
 Gaw, Ralph H., Topeka. Kelso, David, Leavenworth.  
 Gleed, C. S., Topeka. Kenna, E. D., Chicago.  
 Godard, A. A., Topeka. Kimball, C. H., Parsons.  
 Grattan, G. F., McPherson. Kimble, Sam, Manhattan.  
 Graves, Chas. B., Emporia. Lamb, G. H., Yates Center.  
 Green, J. W., Lawrence. Larimer, H. G., Topeka.  
 Greene, A. L., Newton. Larimer, J. B., Topeka.  
 Hagan, Eugene, Topeka. Lewis, C. A., Phillipsburg.  
 Hamilton, Clad, Topeka. Lloyd, Ira E., Ellsworth.  
 Hamilton, J. D. M., Topeka. Love, J. Mack, Arkansas City.  
 Hanson, Jno. F., Lindsborg. Madison, E. H., Dodge City.  
 Harris, Julia F. V., Wellington. Martin, D. H., Topeka.  
 Harvey, A. M., Topeka. Martin, F. L., Hutchinson.  
 Hayden, Chas., Holton. Mason, H. F., Garden City.  
 Hayden, Sidney, Holton. McAnany, Ed. A., Kansas City.  
 Hazen, Z. T., Topeka. McBride, W. T., Wellington.  
 Heizer, R. C., Osage City. McCarty, W. T., Emporia.  
 Herrick, Jas. T., Wellington. McClure, J. R., Junction City.



- McFarland, E. A., Lincoln.  
 McFarland, J. D., Topeka.  
 McMahon, Geo. E., Anthony.  
 Miller, M. M., Topeka.  
 Miller, O. L., Kansas City.  
 Milliken, J. D., McPherson.  
 Milton, B. F., Dodge City.  
 Monroc, Lee, Topeka.  
 Moore, Crompton, Paola.  
 Moore, McCabe, Kansas City.  
 Morris, R. E., Kansas City.  
 Mulvane, D. W., Topeka.  
 Myler, E. W., Burlingame.  
 Overmyer, David, Topeka.  
 Page, H. Ward, Topeka.  
 Palmer, D. E., Topeka.  
 Parker, J. W., Olathe.  
 Peck, Geo. R., Chicago.  
 Perkins, L. H., Lawrence.  
 Perry, Albert, Troy.  
 Pickering, I. O., Olathe.  
 Pollock, J. C., Winfield.  
 Porter, Silas, Kansas City.  
 Postlethwaite, J. C.,  
 Jewell City.  
 Price, H. G., Burlingame.  
 Pringle, J. T., Burlingame.  
 Quinton, E. S., Topeka.  
 Rager, T. F., Erie.  
 Randolph, L. F., Nortonville.  
 Rathbone, David, Hays.  
 Redden, A. L., Topeka.  
 Reeder, Jas. H., Hays.  
 Ritchie, David, Salina.  
 Roark, W. S., Junction City.  
 Rossington, W. H., Topeka.  
 Ryan, Thos.,  
 Washington, D. C.  
 Sapp, W. F., Galena.  
 Saum, W. E., WaKeeney.  
 Schoch, W. F., Topeka.  
 Sedgwick, T. N., Parsons.  
 Sheldon, Lizzie S., Lawrence.  
 Simmons, Jno. S., Dighton.  
 Simpson, M. P., McPherson.  
 Slonecker, J. G., Topeka.  
 Sluss, H. C., Wichita.  
 Smart, C. A., Ottawa.  
 Smith, Chas. Blood, Topeka.  
 Smith, C. W., Stockton.  
 Smith, F. Dumont, Kinsley.  
 Smith, Wm. R., Topeka.  
 Spencer, Chas. F., Topeka.  
 Springer, Alvin R., Manhattan.  
 Stanley, W. E., Wichita.  
 Stavely, J. H., Lyndon.  
 Stillwell, L., Erie.  
 Switzer, J. F., Topeka.  
 Thomson, Wm., Burlingame.  
 Trinkle, H. O., LaCygne.  
 Turner, R. W., Mankato.  
 Valentine, D. M., Topeka.  
 Valentine, H. E., Topeka.  
 Vandever, Geo. A.,  
 Hutchinson.  
 Vernon, W. H., Larned.  
 Vernon, W. H., Jr., Larned.  
 Waggener, B. P., Atchison.  
 Wall, T. B., Wichita.  
 Ware, E. F., Topeka.  
 Watkins, Albert, Topeka.  
 Welch, R. B., Topeka.  
 Wells, Abijah, Seneca.  
 Wells, Ira K., Seneca.  
 West, J. S., Kansas City.  
 Wheeler, Bennett, R., Topeka.

Whitcomb, Geo. H., Topeka.	Wilson, Emera A., Belle Plaine.
White, T. J., Kansas City.	Wood, O. J., Topeka.
Whiteside, H., Hutchinson.	Wulfekuhler, L. H.,
Williams, F. L., Clay Center.	Leavenworth.

# MORTUARY ROLL.

## NAME AND DATE OF DEATH.

Bailey, L. D. . . . .	Oct. 15, 1891
Campbell, A. B. . . . .	Dec. 20, 1897
Crozier, Robert . . . . .	Oct. 2, 1895
Douthitt, Wm. P. . . . .	Nov. 28, 1897
Everest, A. S. . . . .	Oct. 22, 1894
Ewing, Thos. Jr. . . . .	Jan. 21, 1896
Foster, C. G. . . . .	June 21, 1899
Fenlon, Thomas, P. . . . .	Feb. 3, 1901
Green, H. T. . . . .	Mar. 10, 1886
Griffin, Chas. T. . . . .	Jan. 9, 1884
Greer, John P. . . . .	Nov. 28, 1889
Gillett, Almerin . . . . .	May 15, 1896
Hamble, C. B. . . . .	June 14, 1894
Harris, Amos . . . . .	Feb. 2, 1891
Holt, Joel . . . . .	April 27, 1892
Humphrey, H. J. . . . .	Aug. 8, 1890
Hurd, T. A. . . . .	Feb. 22, 1899
Hallowell, J. R. . . . .	June 24, 1898
Johns, H. C. . . . .	May 24, 1894
Johnson, J. B. . . . .	May 18, 1899
Lewis, Ellis . . . . .	Aug. 12, 1897
Maltby, J. C. . . . .	April 27, 1893
Martin, David . . . . .	March 2, 1901
McMath, E. A. . . . .	Aug. 29, 1898
Prescott, J. H. . . . .	July 5, 1891
Ritter, John N. . . . .	Feb. 8, 1896
Robinson, R. G. . . . .	April 18, 1898
Randolph, A. M. F. . . . .	Sept. 1, 1898
Scott, W. W. . . . .	May 31, 1890
Stillings, E. . . . .	Feb. 8, 1890
Stephens, N. T. . . . .	Dec. 29, 1884
Spilman, R. B. . . . .	Oct. 19, 1898
Thacher, S. O. . . . .	Aug. 11, 1895
Usher, John P. . . . .	April 13, 1889
Wagstaff, W. R. . . . .	Feb. 4, 1894
Webb, Leland J. . . . .	Feb. 21, 1893
Wise, Z. S. . . . .	Jan. 8, 1901
Wolf, Eugene . . . . .	Feb. 19, 1899
Webb, W. C. . . . .	April 19, 1898

















